IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges Kirsten Frank Kelly, Douglas B. Shapiro, and Amy Ronayne Krause

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THE SERVICE SOURCE, INC. and THE SERVICE SOURCE FRANCHISE, LLC,

Plaintiffs-Appellees,

Docket No. 147860

v.

DHL EXPRESS (USA), INC.,

Defendant-Appellant.

BRIEF ON APPEAL - APPELLANT DHL EXPRESS (USA), INC.
ORAL ARGUMENT REQUESTED

Attorneys for Defendant-Appellant

Christopher S. Ruhland (pro hac vice)
Andrew S. Wong (pro hac vice)
Amy L. Rudd (pro hac vice)
Dechert LLP
633 West 5th Street, 37th Floor
Los Angeles, CA 90071
Tel: (213) 808-5700

Noreen L. Slank (P31964)
Collins, Einhorn, Farrell P.C.
4000 Town Center, Suite 909
Southfield, MI 48075
Tel: (248) 355-4141

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STATEMENT REGARDING JURISDICTION

This Court has jurisdiction over appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4; MCR 7.301(A)(2). Defendant-Appellant DHL Express (USA), Inc. ("DHL") appeals from the ruling of the Court of Appeals. Appellant's Appendix ("App'x") at 31a-39a (July 11, 2013 Court of Appeals Opinion). That ruling affirmed the trial court's grant of partial summary disposition on liability to Plaintiffs-Appellees The Service Source, Inc. ("TSS") and The Service Source Franchise, LLC ("TSSF"). *Id.*; *see also* App'x at 23a-24a (Oct. 12, 2009 Order Granting Partial Summary Disposition). The Court of Appeals' ruling also affirmed in part the October 20, 2010 amended judgment and order denying a motion for a new trial, signed by Lenawee Circuit Judge Margaret M.S. Noe. App'x at 31a-39a (Court of Appeals Opinion); *see also* App'x at 28a-30a (Oct. 20, 2010 Order Amending July 12, 2010 Judgment and Order and Denying Motion for New Trial). The Court granted DHL's application for leave to appeal on May 23, 2014.

STATEMENT OF QUESTIONS PRESENTED

1. A requirements contract is an agreement in which a supplier agrees to sell – and the buyer agrees to buy – all of the goods described in the contract that the buyer requires. The buyer agrees to buy these goods exclusively from the supplier. DHL entered into non-exclusive discount contracts with Plaintiffs, in which DHL agreed to sell certain services (not goods) that DHL provided to its general customer base. DHL did not agree to fulfill all of Plaintiffs' requirements. Nor did Plaintiffs agree to purchase anything from DHL, much less fulfill all of their requirements from DHL. Are the contracts between DHL and Plaintiffs requirements contracts?

   The trial court did not answer the question.

   The Court of Appeals did not answer the question.

   Plaintiffs have not answered the question.

   DHL submits that the answer is "no."

2. The contracts provided that DHL would pick up and deliver packages only to those locations "regularly" serviced by DHL. As of January 31, 2009, DHL ceased picking up and delivering packages to points solely within the United States for all customers. Plaintiffs claim that the contracts required DHL to provide domestic shipping services to Plaintiffs even though DHL no longer offered those services to anyone else. The trial court granted the Plaintiffs' motion for summary disposition as to liability on their breach of contract claim, ignoring the contractual provision that limited DHL's service obligations. The Court of Appeals agreed that DHL's interpretation of the contracts has literal, textual support, but it nevertheless affirmed summary disposition. Was summary disposition appropriately granted to Plaintiffs on liability?

   The trial court answered the question "yes."

   The Court of Appeals answered the question "yes."

   Plaintiffs contend the answer is "yes."

   DHL submits that the answer is "no."

3. The trial court awarded plaintiff TSS lost profits damages for the period of January 1, 2009 to December 31, 2012 (approximately when the contracts would have ended if not terminated sooner). The Court of Appeals affirmed. However, DHL's alleged breach did not occur until January 31, 2009. In addition, TSS admittedly breached the contract by not paying for shipping services rendered by DHL. DHL properly terminated the contract for non-payment as of March 5, 2009, thus ending DHL's liability for lost profits as of that date. Was the trial court required to limit

lost profits damages to those profits lost between January 31, 2009 and March 5, 2009?

The trial court answered the question "no."

The Court of Appeals answered the question "no."

Plaintiffs contend the answer is "no."

DHL submits that the answer is "yes."

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is about enforcing contracts as written and correctly applying summary disposition and damages law.

Neither the trial court nor the Court of Appeals enforced the contracts as written. In granting Plaintiffs' motion for summary disposition on liability, the trial court effectively excised the key limitation on DHL's obligation to provide shipping services, rendering two clauses of the contracts nugatory. The Court of Appeals recognized the plain meaning of these clauses and noted that they "suggested" DHL's interpretation was correct. But in an effort to read the contracts "as a whole," it rewrote the provisions to say something completely different from the text. In addition, both courts failed to draw all inferences in DHL's favor and actually did the exact opposite. DHL's interpretation of the Reseller Agreement is, at the very least, a reasonable interpretation that should have resulted in the denial of Plaintiffs' motion for summary disposition on liability.

The trial court and the Court of Appeals also failed to follow the law on damages by awarding plaintiff TSS lost profits that were incurred both before the alleged breach and after its contract was terminated. The law does not permit parties to obtain damages that were not caused by the breach. DHL was held liable for breaching the contract with TSS as of January 31, 2009, and damages cannot have accrued until that date. After DHL's alleged breach, TSS continued to take advantage of the contract by obtaining shipping services from DHL, though TSS admittedly failed to pay for those services. Having made an election to continue accepting performance under the contract, TSS was subject to all of the contract's conditions, including the termination for non-payment provision. The express bargain that the parties struck was that DHL could terminate the contract under these circumstances, which DHL did on March 5, 2009. TSS is entitled to no more than the benefits of the bargain, and those benefits ended on March 5, 2009.

Finally, the Court asked the parties to brief whether the contracts at issue are requirements contracts. They are not. Requirements contracts are specialized agreements governed by the UCC involving the sale of goods. They require the buyer to purchase goods from one seller exclusively. The Reseller Agreement is not a contract for the sale of goods and is not exclusive. If the contracts had been requirements contracts, then there would be an issue of fact as to whether and when both parties breached, and a new trial would be required.

STATEMENT OF FACTS

I. The Parties

DHL is a package delivery company that provides express shipping and related services through its global network to locations around the world. DHL's emphasis has always been international shipments, and it is the global market leader in the international express and logistics industry. App'x at 299a-301a (DHL Press Release).

In addition to selling its services directly to customers, DHL also does business with companies known as "resellers." Resellers obtain discounted wholesale shipping rates from delivery companies such as DHL and in turn profit by "reselling" shipping services at higher rates to small and medium-sized businesses. App'x at 364a-366a (Trial Tr. Vol. I). TSS and TSSF were two resellers that resold DHL's express shipping services. TSS and TSSF were related companies that had the same owners and that were operated from the same location. *Id.* at 363a, 367a (Trial Tr. Vol. I). The owners of TSS established TSSF in 2007 to operate a franchise business. App'x at 367a, 375a (Trial Tr. Vol. I; Trial Tr. Vol. III).

II. The Contracts Between DHL And Plaintiffs

DHL and TSS entered into a Reseller Agreement dated January 6, 2006. App'x at 82a-172a (TSS Reseller Agreement). DHL and TSSF entered into a Reseller Agreement dated July 22, 2007. App'x at 174a-297a (TSSF Reseller Agreement). These two contracts are substantially the same. The Reseller Agreements were non-exclusive discount contracts. They provided that DHL would offer Plaintiffs discounted rates on whatever express shipping services DHL offered to its other customers.

There are three provisions that were relevant to Plaintiffs' motion for summary disposition. The first recital states:

> **WHEREAS,** RESELLER has requirements for expedited international air express services for documents and/or packages or freight being sent to various locations around the world and for domestic door-to-door air and ground express services for documents and/or packages or freight being sent to various locations throughout the United States ("Services").

The second recital in the Reseller Agreements states:

> **WHEREAS,** DHL regularly provides such Services for its customers and desires to handle substantially all the requirements of customers of RESELLER ("RESELLER customers") for such Services to the locations served by DHL in accordance with the terms and conditions contained herein.

Finally, Section 1, entitled "The Services," states in relevant part:

> RESELLER agrees to promote DHL's Services to RESELLER customers, and DHL agrees to provide Services to RESELLER customers to fulfill RESELLER customers' needs for Services. RESELLER shall promote DHL's Services as a preferred carrier to RESELLER customers for international and domestic shipments of documents and small packages. Shipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents.

App'x at 82a, 174a (TSS and TSSF Reseller Agreements).

In summary, the parties agreed that DHL only would ship packages to and from domestic and international locations where DHL "regularly" provided these services. The Reseller Agreements did not require that DHL always provide U.S. domestic shipping services. Nor did they contain any language that locked DHL's delivery network into any particular routes or areas.

The Reseller Agreements did not require Plaintiffs to buy from DHL exclusively. Nor did the agreements contain a promise that Plaintiffs would buy anything. Section 21 of the agreements stated that the "discount rates presented are in expectation of minimum monthly payments by RESELLER to DHL for Services of three hundred and twenty eight thousand dollars ($328,000). If such expectations are not met, DHL may elect at its discretion to adjust rates under this Agreement accordingly or to terminate this Agreement." *Id.* at 90a, 182a. Thus,

if Plaintiffs did not meet the minimum, they would not be in breach or subject to a claim for damages. Instead, DHL could change the rates or terminate the contracts.

The Reseller Agreements also described Plaintiffs' payment obligations and the consequences of non-payment. Under Section 16,

> DHL will invoice RESELLER on a weekly basis for the Services provided by DHL to RESELLER customers during the previous week. Invoiced amounts will be remitted by RESELLER to DHL within twenty-one (21) days of invoice date.

Id. at 88a, 180a. Under Section 17(c), DHL was entitled to terminate the agreement for Plaintiffs' non-payment for shipping services provided by DHL:

> Notwithstanding subsections (a) and (b) above, in the event of RESELLER's nonpayment of any bill or other charge when past due and not reasonably contested by RESELLER, DHL may terminate this Agreement upon ten (10) days written notice.

Id. at 89a, 181a.

III. DHL's Cessation Of U.S. Domestic Shipping Services

DHL's United States domestic shipping business was not a financial success. The business consistently lost a lot of money, particularly during the U.S. financial crisis in 2008. *See* App'x at 78a-79a (Affidavit of George (Hank) Gibson, ¶¶ 7, 9). For that reason, on November 10, 2008, DHL publicly announced that it would cease U.S. domestic shipping services after January 30, 2009. App'x at 299a-301a (DHL Press Release). DHL's press release stated that after January 30, 2009, DHL would continue to provide its full range of international shipping services to its customers, including its customers in the United States. *Id.*

Also on November 10, DHL sent a letter to Plaintiffs explaining the decision and stating that DHL "look[s] forward to continuing to work with you." App'x at 40a (Nov. 10, 2008 Letter from Chris Fris to Louis Meeks). As DHL's letter noted, Plaintiffs' customers could still ship

domestically until January 30, 2009, and could continue to ship internationally through the end of the terms of the agreements. *Id.*

IV. Plaintiffs' Conduct Following The November 10 Announcement

Section 17(b) of the contracts gave Plaintiffs the right to send DHL a letter of default and to terminate the contracts if Plaintiffs believed DHL was in breach. Plaintiffs never did so. Nor did Plaintiffs sue DHL following the November 10 announcement.

Instead, Plaintiffs continued to seek and accept DHL's performance under the contracts by having their customers ship packages with DHL. The undisputed evidence was that Plaintiffs' customers shipped thousands of packages after November 10, 2008, and they shipped hundreds of international packages after January 30, 2009. App'x at 377a-379a, 386a-387a (Trial Tr. Vol. III). Plaintiffs indicated that they intended the contracts to continue in other ways as well. For example, on December 8, 2008, Plaintiffs' president sent an e-mail to his contact at DHL, in which he sought to sign up additional international customers with DHL and asked what DHL's rates would be for 2009. App'x at 41a (Dec. 8, 2008 E-mails between Chris Fris and Louis Meeks).

At the same time, Plaintiffs moved some of their customers' shipping business away from DHL and to DHL's competitor, UPS. On December 2, 2008, TSS entered into an agreement directly with UPS, and TSS transferred more than 3,000 of its customers from DHL to UPS under this agreement. *See* App'x at 42a-49a (Carrier Agreement); App'x at 369a-370a (Trial Tr. Vol. I). On January 12, 2009, TSS entered into an agreement with a third party that resold UPS services, under which TSS would obtain commissions for moving customers from DHL to UPS. In that agreement, TSS represented that it was "in the business of reselling certain expedited shipping and freight services of third parties, including DHL Express (USA), Inc." App'x at 50a-57a (Commission Agreement).

V. TSS Fails To Pay For Shipments, And DHL Terminates The TSS Reseller Agreement

Despite continuing to take advantage of its contract with DHL, TSS decided to stop paying for shipping services rendered by DHL.[1] By February 2009, TSS owed DHL almost $600,000 for packages shipped by DHL under the agreements. App'x at 61a (TSS Notice of Non-Payment). On February 23, 2009, DHL informed TSS that DHL would terminate the Reseller Agreement if TSS did not pay the amounts due. *Id.* TSS never responded to DHL's notice and did not contest it in any way. App'x at 384a-385a (Trial Tr. Vol. III). On March 5, 2009, DHL terminated TSS's agreement for non-payment. *Id.* at 386a. TSS never disputed the debt or the termination. App'x at 359a-360a (Trial Tr. Vol. I); App'x at 384a-385a (Trial Tr. Vol. III).

VI. The Complaint And The Counterclaim

Plaintiffs filed a complaint against DHL on February 10, 2009, asserting a single claim for breach of contract that alleged DHL was required to provide U.S. domestic shipping services through the terms of the agreements. App'x at 60a (Complaint, ¶ 14).[2]

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[1] TSSF stopped paying DHL at the same time that TSS did, and DHL terminated TSSF's agreement for non-payment as of March 5, 2009. App'x at 62a (TSSF Notice of Non-Payment); App'x at 382a-383a (Trial Tr. Vol. III). TSSF did not contest the termination. App'x at 383a (Trial Tr. Vol. III). However, TSSF's nonpayment and termination are not relevant to this appeal because TSSF did not seek lost profits damages. TSSF never made a profit, and therefore TSSF sought reliance damages – the amount of money TSSF had invested in its business. App'x at 392a (Knapp TSSF Damages Analysis); App'x at 390a (Trial Tr. Vol. IV). The parties had a dispute over the amount of TSSF's damages, but that is not part of this appeal.

[2] Plaintiffs' complaint suggests that DHL anticipatorily breached the contracts on November 10, 2008. App'x at 60a (Complaint, ¶ 14). However, Plaintiffs expressly abandoned any anticipatory repudiation argument. As Plaintiffs' counsel told the trial court at the hearing on Plaintiffs' motion for summary disposition, "[t]here is no anticipatory breach or anything like that in this case." App'x at 310a (Oct. 12, 2009 Hr'g Tr.). The trial court agreed, stating at the hearing, "I didn't see where any Plaintiff saw any anticipatory breach feature." *Id.* at 315a.

DHL counterclaimed for breach of contract for Plaintiffs' failure to pay for the domestic and international shipping services provided by DHL. App'x at 70a-71a (Defendant DHL Express (USA), Inc.'s Amended Answer and Counterclaims, ¶¶ 13-19).

VII. The Trial Court Grants Plaintiffs' Motion For Partial Summary Disposition

Just four months after filing the lawsuit, Plaintiffs moved for partial summary disposition under MCR 2.116(C)(10) as to liability on their breach of contract claim. *See* App'x at 4a (Trial Court Dkt. No. 29). Plaintiffs relied on the contracts alone in arguing that DHL breached the Reseller Agreements by ceasing U.S. domestic shipping services.

In opposition, DHL presented affidavits attaching exhibits, documents, and deposition testimony highlighting several disputed issues of material fact about the interpretation of the contracts. That evidence included an affidavit from DHL Vice President Hank Gibson, who oversaw the negotiations with Plaintiffs and signed the Reseller Agreements. Mr. Gibson explained DHL's intent in signing the agreements and DHL's interpretation of Section 1 of the agreements. App'x at 76a-77a (Gibson Aff., ¶¶ 7, 9). Mr. Gibson's affidavit stated that "under the reseller agreements, DHL agreed to supply only those services to [Plaintiffs'] customers that it regularly provides." *Id.* at 75a (Gibson Aff., ¶ 4). Thus, if DHL no longer regularly provided services to or from locations, DHL would not be required to provide those services to the Plaintiffs' customers. *Id.*

At the hearing on Plaintiffs' motion, the trial court and counsel for Plaintiffs engaged in a discussion about "facts" that occur nowhere in any affidavits or documents submitted with the motion. App'x at 307a-309a (Oct. 12, 2009 Hr'g Tr.). For example, the trial court asked Plaintiffs' counsel whether DHL provided domestic shipping when the agreement was first signed, what percentage of Plaintiffs' business came from domestic versus international

shipping, and what DHL's service guarantee meant to Plaintiffs' business. *Id.* Plaintiffs' counsel provided information that was both inaccurate and inadmissible.

In ruling, the trial court acknowledged the dispute regarding the interpretation of the contracts, stating "I think there are probably all kinds of ways to shade the facts here." *Id.* at 330a. Nonetheless, the trial court, without identifying a single provision in the agreements or any other admissible evidence, held that DHL breached the agreements. *Id.* In addition, the trial court relied on the representations of Plaintiffs' counsel and found that "[DHL] no longer provides the same services that were provided to the Plaintiff at the time that the contract was entered into and that was in fact the practice between the parties for all that time up until such time as Defendant ceased providing that for Plaintiffs." *Id.* The summary disposition record, however, was silent on the parties' "practice" during the course of the contract.

The trial court concluded that DHL breached the contracts on January 31, 2009, which is the first day that DHL ceased providing domestic delivery services, and it granted Plaintiffs' motion for partial summary disposition. *Id.* at 323a-324a, 330a; App'x at 405a-406a (Findings of Fact, Conclusions of Law, and Final Ruling, June 11, 2010 Hr'g Tr.).

VIII. The Trial

Trial on DHL's counterclaim for Plaintiffs' non-payment and on the issue of Plaintiffs' damages from DHL's alleged breach of the contracts began on February 9, 2010. During opening statements, TSS admitted liability as to DHL's counterclaim. TSS conceded that it owed the full amount DHL claimed ($673,211) for domestic and international shipping services, and the trial court awarded DHL this amount. App'x at 359a-362a (Trial Tr. Vol. I). It was undisputed that TSS made its last payment to DHL on December 2, 2008, but that TSS continued to use DHL's shipping services without paying for them through the first several months of 2009. *Id.* at 380a (Trial Tr. Vol. III).

The remainder of the trial was devoted to Plaintiffs' damages claims. Plaintiffs presented testimony from two witnesses: their president, Louis Meeks, and their damages expert, Bruce Knapp. Mr. Knapp attempted to calculate TSS's lost profits from January 1, 2009, to December 31, 2012. App'x at 372a-373a (Trial Transcript Vol. II); App'x at 395a (Knapp TSS Damages Analysis).

DHL presented undisputed evidence that TSS breached Section 16 of the Reseller Agreement in December 2008 when TSS stopped paying for domestic and international shipping services rendered by DHL. *See* App'x at 380a (Trial Tr. Vol. III). It was also undisputed that DHL provided notice of non-payment and properly exercised its rights under Section 17(c) to terminate the agreement. *Id.* at 384a-386a; App'x at 61a (TSS Notice of Non-Payment). The TSS agreement was lawfully terminated on March 5, 2009. App'x at 386a (Trial Tr. Vol. III); App'x at 61a (TSS Notice of Non-Payment). DHL argued throughout trial and post-trial proceedings that damages should be limited to the period of January 31, 2009 to March 5, 2009.

The trial court signed an Order of Judgment on July 12, 2010. App'x at 25a-27a (July 12, 2010 Order of Judgment). The trial court awarded $4,291,000 in lost profit damages to TSS for the entire period from January 1, 2009 to December 31, 2012. *Id.* The trial court awarded DHL $673,211 against TSS on DHL's counterclaim. *Id.* On October 20, 2010, the trial court amended this judgment and denied DHL's motion for new trial. App'x at 28a-30a (Oct. 20, 2010 Order). The trial court never explained why it awarded profits lost before January 31, 2009 or after March 5, 2009.

IX. The Court Of Appeals Decision

The Court of Appeals affirmed the trial court's grant of partial summary disposition on the issue of liability in favor of Plaintiffs. App'x at 35a (Court of Appeals Opinion).

The Court of Appeals acknowledged that the plain language of the contracts can be read to support DHL's position:

> As defendant argues, one sentence of the contract suggests that defendant was free to cease service to any location if it so chose: "Shipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents." This suggests that if DHL ceased regular service in any given area, it would no longer be required to collect or deliver there for plaintiffs. If one were to consider only this sentence, it would appear that defendant's argument is correct that it was not bound to pick up or deliver packages at any domestic location.

Id. However, the Court of Appeals then stated that, "[t]aken as a whole, the contracts between the parties clearly contemplate that defendant would provide domestic service." *Id.* The Court of Appeals held that "[t]here is no indication that the parties intended to allow DHL to completely cease either domestic or international service." *Id.* Yet this is exactly what the court twice said that the text "suggested."

The Court of Appeals next provided a new interpretation of the "regularly serviced" provision: that "defendant could likely cease service to a handful of specific domestic locations without breaching the contract, but could not completely stop all domestic service." *Id.* Presumably because DHL ceased service in more than a "handful of specific domestic locations," the Court of Appeals affirmed summary disposition that DHL breached the contracts.

On the damages issues, the Court of Appeals affirmed the award of damages to TSS beginning on January 1, 2009, despite that the alleged breach by DHL did not occur until January 31, 2009. *Id.* at 37a. The Court of Appeals acknowledged that "it is undisputed that some domestic shipping continued during January 2009." *Id.* Nevertheless, the Court of Appeals concluded that because there was "evidence that TSS did not make a profit during January of 2009, and there was evidence that under normal circumstances it would have been profitable," the trial court was permitted to award damages for the period prior to the alleged breach. *Id.*

Regarding the termination of the contracts on March 5, 2009, the Court of Appeals acknowledged that DHL terminated the contracts for non-payment. *Id.* at 33a. The court, however, did not address the consequences of the termination or DHL's argument that TSS cannot be awarded damages for profits it would have gained after its contract was properly terminated. DHL moved for reconsideration, asking the Court of Appeals to rule on this issue, but the motion was denied.

STANDARD OF REVIEW

In *Klapp v United Insurance Group Agency, Inc*, this Court set forth the relevant standard of review on appeal from a summary disposition ruling in a breach of contract case:

> We review de novo a trial court's ruling on a motion for summary disposition. Similarly, whether contract language is ambiguous is a question of law that we review de novo. Finally, the proper interpretation of a contract is also a question of law that we review de novo.

468 Mich 459, 463; 663 NW2d 447 (2003) (citations omitted).[3] Because the "proper measure of damages" in this case "revolves around a question of law," this Court's review of that issue is also de novo. Tab A, *Ehlert v. Wiser*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 11, 2003 (Case No. 239777) (citing *Cardinal Mooney High School v Mich High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991)).

[3] As has been noted, the Reseller Agreements contain a Florida choice-of-law provision. However, the parties have never suggested that there is any difference between Michigan and Florida law that is relevant to this appeal. App'x at 35a (Court of Appeals Opinion ("Neither party suggests that there is any relevant difference between Florida and Michigan law when it comes to contract interpretation.")). For the reasons explained in DHL's Opposition to Plaintiffs' Motion for Reconsideration, the Court can and should apply Michigan law.

ARGUMENT

I. The Contracts Are Not Requirements Contracts

This Court has never provided definitive guidance on how Michigan courts should determine whether a particular agreement is a requirements contract. Neither Plaintiffs nor DHL argued that the two agreements at issue are requirements contracts, and this is the first time that the issue has been raised in this lawsuit. For the reasons that follow, the Reseller Agreements are not requirements contracts. Had the Plaintiffs argued at summary disposition that the agreements were requirements contracts, that argument would have created an issue of fact precluding summary disposition. A conclusion by this Court that the agreements are requirements contracts would also require reversal of summary disposition, a trial on liability, and a new trial on damages.

A. A Non-Exclusive Contract For The Sale Of Services Is Not A Requirements Contract

The contracts are not requirements contracts for two main reasons. First, the contracts involve the sale of discounted shipping services, not goods. Second, the contracts are not exclusive.

1. The Contracts Do Not Involve A Sale Of Goods

The contracts between DHL and Plaintiffs involve the sale of discounted shipping services, not the sale of goods. This Court has never decided whether a contract for the sale of services can constitute a requirements contract. However, requirements contracts are creatures of the Uniform Commercial Code. The UCC requires that a contract for the sale of goods include a quantity term. At common law, courts were reticent to enforce contracts for the sale of goods lacking a quantity term, and the UCC solved that problem by permitting the enforcement of these contracts so long as they comply with the UCC's provisions regarding quantity. Unlike

contracts for the sale of goods, many service contracts need not have a quantity term to be enforceable.

Since the adoption of the UCC, virtually all cases involving requirements contracts – in Michigan and elsewhere – are analyzed through the lens of the UCC. Under Michigan law, "[c]ontracts for services are governed by the common law," not the UCC. Tab B, *J&B Sausage Co v Dep't of Mgmt & Budget*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 4, 2007 (Case No. 259230), at *1 (citing *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40, 45; 585 NW2d 314 (1998)). Prior to the adoption of Michigan's UCC, no Michigan court applying common law ever held that a services contract could be a requirements contract. Nor has any Michigan court since then held that a contract for services was a requirements contract.[4]

Moreover, courts in other jurisdictions have held that "[f]or there to be a requirements contract, the UCC must be applicable." *Monarch Photo, Inc v Qualex, Inc*, 935 F Supp 1028, 1032 (DND 1996); Tab C, *Westpoint Stevens, Inc v Panda-Rosemary Corp*, unpublished opinion of the Superior Court of North Carolina, issued Dec. 16, 1999 (Case No. 99-CVS-9818), at *4; *see also* Tab D, *Baxter Healthcare Corp v Fresenius Medical Care Holdings, Inc*, unpublished opinion of the United States District Court for the Northern District of California, issued Feb. 19, 2010 (Case No. C-07-1359 PJH), at *14 (contract that provided for provision of "services and a patent license" but not the delivery of any goods was not a "requirements contract"); 2A

[4] Notwithstanding the dearth of law on this issue, in *J&B Sausage Co. v. Department ofManagement & Budget*, the Michigan Court of Appeals suggested that service agreements can be considered "requirements contracts" under Michigan common law. Tab B, at *3. However, the cases cited by the Court of Appeals for this proposition were cases involving a sale of goods, not services. *See E.G. Dailey Co v Clark Can Co*, 128 Mich 591, 594, 87 NW 761 (1901); *Hickey v O'Brien*, 123 Mich 611, 612, 82 N.W. 241 (1900). And in *J&B Sausage Co.*, the Court of Appeals overruled the trial court's judgment that the service agreement in question was a requirements contract. Tab B, at *3.

Anderson UCC § 2-306:3 (3d ed) (treatise cited with approval in *Lorenz Supply Co v Am Standard, Inc*, 419 Mich 610, 614 n4, 358 NW2d 845 (1984)). Likewise, commentators regularly define "requirements contracts" to include only those involving a sale of goods under the UCC. *See, e.g.*, Farnsworth on Contracts § 2.15; 1 White, Summers, & Hillman, UCC § 4:20 (6th ed). The Court should take this opportunity to join these commentators and courts and hold that contracts for services, like those at issue here, do not qualify as requirements contracts under Michigan law.

2. The Contracts Are Not Exclusive

The agreements between DHL and Plaintiffs also are not requirements contracts because they are not exclusive. It "has long been recognized" that exclusivity is essential to requirements contracts because it "creat[es] the mutuality necessary for a valid contract." 1 White, Summers, & Hillman, UCC § 4:20. As one leading commentator has explained, because the buyer under a requirements contract "retains a great deal of discretion as to the quantity ordered," there must be limits to that discretion to ensure that the buyer supplies sufficient consideration for the contract. 2-6 Corbin on Contracts § 6.5. One of those limits is the buyer's obligation to purchase exclusively from the seller. *Id.* Although this Court has never decided whether a requirements contract must be exclusive, the Michigan Court of Appeals has repeatedly held that exclusivity is required. *See, e.g.*, Tab E, *Acemco, Inc v Olympic Steel Lafayette, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 27, 2005 (Case No. 256638), at *8 (agreement was not a requirements contract where "nothing in the . . . agreement" bound plaintiff to purchase goods exclusively from defendant); Tab F, *Benedict Mfg Co v Aeroquip Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2004 (Case No. 242563), at *3 n5 (defining a "requirements contract" as one that requires the buyer to purchase its requirements

"exclusively" from the seller).[5] Likewise, most courts outside of Michigan and commentators agree that a requirements contract must create an exclusive relationship between buyer and seller.[6]

The agreements between DHL and Plaintiffs do not contain an exclusivity provision. The word "exclusive" appears nowhere in the agreements, nor is there any other language that prohibits Plaintiffs from obtaining express shipping services from another supplier. Absent exclusivity, the contracts are not requirements contracts.

B. If Plaintiffs Had Argued That These Were Requirements Contracts, That Would Have Created An Issue Of Fact Requiring A Trial

Even if the Court believes that the agreements between DHL and Plaintiffs are requirements contracts, that would require the Court to remand the case for a trial on liability and damages. No Michigan court has ever determined as a matter of law without the benefit of extrinsic evidence that a contract is a requirements contract where that issue was disputed by the parties. To the contrary, Michigan courts regularly submit that disputed issue to the trier of fact to decide. *See, e.g.*, Tab H, *Foamade Indus v Visteon Corp*, unpublished opinion of the Court of Appeals, issued March 4, 2008 (Case No. 271949), at *4-5, 11 (reversing trial court's order

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[5] A single opinion of the Michigan Court of Appeals suggests in dicta that Michigan courts do not require exclusivity, but that case relies on one federal case that misquotes the Michigan standard and is wrong. *See* Tab G, *Plastech Engineered Products v Grand Haven Plastics, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 2005 (Case No. 252532), at *7.

[6] 3 Williston on Contracts § 7:12 (4th ed.); *see also, e.g., Merritt-Campbell, Inc v RxP Prods, Inc*, 164 F3d 957, 963 (CA 5, 1999); *Orchard Grp, Inc v Konica Med Corp*, 135 F3d 421, 429-30 (CA 6, 1998); *ON Jonas Co, Inc v Badische Corp*, 706 F2d 1161, 1164-65 (CA 11, 1983); *Harvey v Fearleses Farris Wholesale, Inc*, 589 F2d 451, 461 (CA 9, 1979); *GB "Boots" Smith Corp v Cobb*, 860 So 2d 774, 777 (Miss 2003); *PMC Corp v Houston Wire & Cable Co*, 147 NH 685, 690-91, 797 A2d 125 (NH 2002); *United Servs Auto Ass'n v Schlang*, 111 Nev. 486, 490-91, 894 P2d 967 (Nev 1995); *Alyeska Pipeline Serv Co v O'Kelley*, 645 P2d 767, 772 n.3 (Alas 1982); *Wilsonville Concrete Prods v Todd Bldg Co*, 281 Or 345, 350, 574 P2d 1112 (Or 1978); *Kirkwood-Easton Tire Co v St Louis Cnty*, 568 SW2d 267, 268 (Mo 1978).

granting summary disposition because issues of fact precluded determination as a matter of law of whether contract was a requirements contract). Courts in Michigan have concluded that extrinsic evidence is required to determine, among other things:

- The meaning of a disputed or ambiguous quantity term, *Aleris Aluminum Canada, LP v Valeo, Inc*, 718 F Supp 2d 825, 831-33 (ED Mich 2010);
- Whether the parties' course of dealing and course of performance supports a finding of exclusivity, Tab I, *Eberspaecher N Am, Inc v Nelson Global Prods, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued Mar. 4, 2008 (Case No. 271949), at *7; and
- Whether the buyer purchased goods from other suppliers, thereby undermining any finding of exclusivity, *id.* at 6.

If the agreements are requirements contracts, then a trial on liability is necessary. Under a requirements contract, Plaintiffs would have been obligated to purchase shipping services exclusively from DHL. But Plaintiffs would have been in breach of their exclusivity obligations because they moved thousands of their customers to UPS in December 2008. App'x at 369a-370a (Trial Tr. Vol. I). At that time, DHL was still providing domestic shipping services to its general customer base and was continuing to offer those services to Plaintiffs. Assuming the agreements are requirements contracts, DHL should be permitted, prior to the adjudication of its own liability, to prove that Plaintiffs were in material breach of their exclusivity obligations.

Second, if these agreements are requirements contracts, a new trial on damages would be necessary. In calculating damages from breach of a requirements contract, the court should look to "what the buyer might have ordered during the remaining life of the contract, multiply this quantity by the contract price, and arrive at a total contract price to be used for computing damages." 1 White, Summers, & Hillman, UCC § 4:20. Any such calculation would require evidence of what Plaintiffs' requirements were, to what extent those requirements were not met, during which periods of time their requirements were not met, and what impact DHL's failure to

meet those requirements had on Plaintiffs' business. All of these questions could affect the award of damages in this case and cannot be resolved on the present record.

II. Plaintiffs Should Not Have Been Granted Summary Disposition On Liability

The trial court and the Court of Appeals did not follow the law in ruling on Plaintiffs' motion for summary disposition. When considering a motion for summary disposition on liability, where the issue is the meaning of a contract, a court should use three gates to determine whether the motion should be granted. First, if the non-moving party presents the only reasonable interpretation of the contract, the motion should be denied. Second, if both parties present reasonable interpretations of the contract, the motion should be denied. Finally, if two relevant contract provisions conflict and cannot be reconciled, the motion should be denied. At all times, the court must construe the evidence (the contract) in the light most favorable to the non-moving party. Only if the contract provisions are in harmony and can support only the moving party's interpretation should a court grant summary disposition.

As discussed below, summary disposition should have been denied because (1) only DHL advanced a reasonable interpretation of the contracts; (2) even if the Plaintiffs had advanced a reasonable interpretation, DHL's interpretation was still reasonable; and (3) if an interpretation other than DHL's is accepted, the relevant contract provisions are in irreconcilable conflict. Thus, at every gate in the analysis, the motion should have been denied.

A. Summary Disposition Should Have Been Denied Because Only DHL Advanced A Reasonable Interpretation Of The Contracts

This Court has stated that a "fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.* Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Rory v Continental Ins Co*, 473 Mich

457, 468; 703 NW2d 23 (2005). Only DHL offered an interpretation of the Reseller Agreements that would allow a court to enforce the contracts as written, without deleting, ignoring, or modifying portions of the parties' agreements.

1. DHL's Interpretation Gives Plain And Reasonable Meaning To The Contracts

DHL interprets the contracts to mean that DHL was required to pick up and deliver packages for Plaintiffs' customers only to the locations regularly serviced by DHL. This interpretation gives effect to all of the provisions at issue and makes commercial sense.

The term "Services" is defined in the first recital to include domestic and international shipping services. App'x at 82a, 174a (TSS and TSSF Reseller Agreements). The second recital describes the extent of DHL's commitment to provide Services: "DHL regularly provides such Services for its customers and desires to handle substantially all the requirements of customers of RESELLER ('RESELLER customers') for such Services to the locations served by DHL in accordance with the terms and conditions contained herein." *Id.* The first sentence of Section 1 states that "DHL agrees to provide Services to RESELLER customers to fulfill RESELLER customers' needs for Services." *Id.* The third sentence of Section 1 expressly limits DHL's obligation to provide Services: "Shipments will originate at RESELLER customers' domestic locations at which DHL regularly provides collection service with its own personnel and will be delivered to any destination regularly serviced by DHL or its designated agents." *Id.*

When all of the relevant provisions are read together, the contracts obligated DHL to provide Plaintiffs' customers domestic and international shipping services under certain conditions. For example, if DHL "regularly provide[d] collection service with its own personnel" in Chicago and "regularly serviced" the "destination" of Miami, then under Section 1 any of Plaintiffs' customers could expect DHL to deliver a package from Chicago to Miami.

However, in a different situation, if DHL did not "regularly service" the destination of Havana, Cuba from Chicago, then Plaintiffs' customers could not expect DHL to ship a package from Chicago to Havana.

This interpretation ensures that no contract language is rendered meaningless. It also makes commercial sense, because it means that DHL agreed that whatever infrastructure it had in place to pick up and deliver packages to any particular location would be available at a discount to Plaintiffs' customers – nothing more and nothing less.[7]

2. The Trial Court's Interpretation Excises Provisions From The Contracts

By contrast, neither the trial court nor Plaintiffs ever gave any meaning to the second recital or to the third sentence of Section 1. Instead, their interpretation excised important portions from the contracts completely. The contracts would read, in part, like this:

> **WHEREAS,** DHL regularly provides such Services for its customers and desires to handle substantially all the requirements of customers of RESELLER ("RESELLER customers") for such Services ~~to the locations served by DHL in accordance with the terms and conditions herein~~.
>
> * * * *
>
> RESELLER agrees to promote DHL's Services to RESELLER customers, and DHL agrees to provide Services to RESELLER customers to fulfill RESELLER customers' needs for Services. . . . Shipments will originate at RESELLER customers' domestic locations ~~at which DHL regularly provides collection services with its own personnel~~ and will be delivered to any destination ~~regularly serviced by DHL or its designated agents~~.

As this Court has noted, courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or

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[7] If the Court agrees that DHL advanced the only reasonable interpretation of the contracts, then the Court should not only reverse summary disposition for Plaintiffs, but also order the trial court to render judgment in favor of DHL on liability. *See* MCR 2.116(I)(2) ("If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.").

nugatory." *Klapp*, 468 Mich at 468. The trial court's and Plaintiffs' interpretation fails that test and therefore cannot be reasonable. Moreover, a "contract will not be presumed to have imposed an absurd or impossible condition on one of the parties, but will be interpreted as the parties must be supposed to have understood the conditions at the time." *Knox v Knox*, 337 Mich 109, 120; 59 NW2d 108 (1953). Under the Plaintiffs' interpretation, if DHL decided not to service a particular location for all of its customers, DHL would have to maintain stations, employees, and vehicles in that location if Plaintiffs had even one customer that wanted to ship a package there. It would make no sense for DHL or any other major supplier of services to a great number of customers to agree to such a contract.

3. The Court Of Appeals Rewrote The Contracts

The Court of Appeals appeared to accept that the "regularly service" provisions must be given some meaning. But the Court of Appeals also did not provide a reasonable interpretation. According to the Court of Appeals, the contracts mean that DHL "likely could cease service to a handful of specific domestic locations without breaching the contract, but could not completely stop all domestic service." App'x at 35a (Court of Appeals Opinion). There is no textual support for the "handful" interpretation. Nor was there any other evidentiary support in the summary disposition record. Instead, this is a concept that the Court of Appeals wrote into the contracts – or more precisely, held was "likely" the right concept. This Court has explained that "it has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). That is exactly what the Court of Appeals did here.

The Court of Appeals justified its decision by reciting the principle that contracts should be read "as a whole," citing *Royal Property Group, LLC v. Prime Insurance Syndicate*, 267 Mich App 708, 719; 706 NW2d 426 (Mich App 2005). App'x at 35a (Court of Appeals Opinion). But

the Court of Appeals misapplied this principle. Neither *Royal Property Group* nor any other case holds that reading a contract "as a whole" allows a court to rewrite an express condition in a contract. If that were the law, judges would be free at summary disposition to rewrite those portions of contracts that did not fit within a particular judge's vision of what the contract meant "as a whole." However, this Court has made it clear that courts "may not make a new contract for parties under the guise of a construction of the contract, if doing so will ignore the plain meaning of words chosen by the parties." *Zahn v Kroger Co of Mich*, 483 Mich 34, 41; 764 NW2d 207 (2009). The "whole" contract between DHL and Plaintiffs included an express limitation on DHL's service obligations and did not provide that DHL could only "cease service to a handful of specific domestic locations."

If anything, the Court of Appeals introduced an ambiguity into the Reseller Agreements. If the Reseller Agreements really limited DHL to ceasing services at a "handful" of locations, how would DHL know what a "handful" was and when it could be liable for removing one location too many? A court should not adopt an interpretation of a contract – especially at summary disposition – that creates an ambiguity about a party's obligation. At the very least, DHL should have been given a trial so that it could prove that the "handful" interpretation is wrong and was not within the parties' expectations.

The interpretations offered by Plaintiffs, the trial court, and the Court of Appeals all failed to satisfy fundamental rules of contract construction. That left DHL's interpretation as the only reasonable one, and Plaintiffs' motion for summary disposition should have been denied.

B. Even If DHL's Interpretation Was Not The Only Reasonable Interpretation, Summary Disposition Should Have Been Denied

DHL believes that its interpretation of the contracts is correct and is the only reasonable interpretation. But even if there were another reasonable interpretation, the law required the trial

court to deny Plaintiffs' motion for summary disposition. It was Plaintiffs' burden to prove that there was "no genuine issue as to any material fact" and that their interpretation of the contracts was correct "as a matter of law." MCR 2.116(C)(10). A genuine issue of fact exists under MCR 2.116(C)(10) when "viewing the evidence in the light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Bonner v City of Brighton*, 495 Mich 209, slip op at *4 (2014). As the Court of Appeals correctly explained in *D'Avanzo v Wise & Marsac, PC*, "in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous. A contract is ambiguous if the language is susceptible to two or more reasonable interpretations." 223 Mich App 314, 319; 565 NW2d 915 (Mich App 1997). Thus, Plaintiffs had to prove that the Reseller Agreements are unambiguous as a matter of law and that reasonable minds could not differ on whether Plaintiffs' interpretation of the contracts was correct.

This is not the legal standard applied by the trial court or the Court of Appeals. To the contrary, both courts noted that the contracts could be read in different ways, but held that summary disposition was nevertheless appropriate. The trial court found that "there are probably all kinds of ways to shade the facts here," yet it shaded the facts in favor of Plaintiffs. *See* App'x at 330a (Oct. 12, 2009 Hr'g Tr.). The Court of Appeals went even further, acknowledging that DHL's interpretation has textual support: "As defendant argues, one sentence of the contract suggests that defendant was free to cease service to any location if so chose." App'x at 35a (Court of Appeals Opinion). This should have been the end of the analysis, especially since "the pleadings, depositions, admissions, and any other admissible evidence are viewed in the light most favorable to the nonmoving party." *Rory*, 473 Mich at 464. When the contracts are read in

the light most favorable to DHL, DHL's interpretation is at least reasonable, which precludes summary disposition for Plaintiffs.

And as this Court explained, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp*, 468 Mich at 453-54. That is because "[w]here a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning." *Id.* at 454 (quoting 11 Williston on Contracts § 30:7 (4th ed)).

At the very least, DHL should have had the opportunity to convince a fact-finder that its interpretation of the Reseller Agreements is the more reasonable interpretation.

C. If Provisions Of The Reseller Agreements Are In Conflict, Summary Disposition Should Have Been Denied

Finally, this Court has held that "if two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous. Further, courts cannot simply ignore portions of a contract to avoid a finding of ambiguity or to declare an ambiguity. Instead, contracts must be construed so as to give effect to every word or phrase as far as practicable." *Klapp*, 468 Mich at 467. *Klapp* is instructive. In that case, two provisions in a contract suggested different timetables for an insurance agent to be vested in a commission payment program. The Court of Appeals attempted to avoid a finding of ambiguity by giving meaning to one part of the contract, but it "ignored another portion of the contract." *Id.* at 468. This Court reversed because the two provisions, when given their plain meaning, were in conflict. *Id.* at 468-69, 480-81.

In this case, the Court of Appeals pointed to a potential conflict within Section 1 of the Reseller Agreements. If the first sentence of Section 1 means that DHL must always pick up and deliver packages everywhere in the world for the life of the agreements, and if that provision is not limited by the third sentence, then there is a conflict between the first and third sentences. If that is the case, then the Reseller Agreements are ambiguous as a matter of law and must be interpreted by a fact-finder at a trial.

III. DHL Is Not Responsible For Profits Lost Before Breach Or After Contract Expiration

Contract law requires that a damages award be limited to those damages suffered between the time of the breach and the time that the contract ended. The trial court and the Court of Appeals erred by permitting TSS to recover lost profits damages incurred both before the alleged breach and after TSS's contract with DHL terminated.

A. Damages Should Not Have Been Awarded For The Period Before DHL's Alleged Breach

Contract damages cannot arise until one party has breached the contract. This Court has explained that "causation of damages is an essential element of any breach of contract action." *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; __NW2d __ (2014). Thus, a "party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Id.*; *see also* 11-15 Corbin on Contracts § 55.3 ("It is only when the other party has committed a breach that the other party can be so charged; even then the compensatory damages are limited to those losses and pecuniary disappointments that are 'caused' by the breach."). There is no legal basis for the award for damages that TSS allegedly suffered prior to January 31 because lost profits before that date were not caused by DHL's alleged breach.

The Court has never stated explicitly that profits lost before a breach of contract are not recoverable in a breach of contract action. The Court should do so now. As noted above, DHL was not held liable for any breach other than ceasing domestic shipping on January 31, 2009. Nevertheless, TSS's damages expert calculated lost profits damages starting on January 1, 2009. The trial court awarded TSS these damages without explanation, and the Court of Appeals affirmed.

The Court of Appeals did not determine that DHL breached the contract with TSS prior to January 31, 2009, or that DHL refused to ship any domestic packages for TSS during January 2009. Instead, the Court of Appeals focused on TSS's financial performance in January. The Court of Appeals stated that there was "no evidence" that TSS was profitable in January and that DHL's November 10 announcement had "an immediate impact on TSS's business, particularly after DHL ceased guaranteeing delivery dates as of November 18, 2008." App'x at 37a (Court of Appeals Opinion).

The Court of Appeals was wrong to focus on the condition of TSS's business and DHL's conduct prior to January 31. If TSS believed that DHL's November 10, 2008 announcement or DHL's subsequent reduction of service guarantees breached the contract, TSS could have moved for summary disposition on that basis. It did not. Nor did the trial court or the Court of Appeals determine that the November 10 announcement or the reduction in service guarantees breached the contract. Because DHL was not found to have breached until January 31, 2009, any harm to TSS as a result of DHL's conduct prior to January 31, 2009, is irrelevant and cannot support an award of pre-January 31 damages.

B. TSS Was Not Entitled To Damages For Loss Suffered After March 5, 2009

Neither the trial court nor the Court of Appeals ever explained how it is possible that TSS could be awarded contract damages suffered through December 2012, when DHL lawfully

terminated the Reseller Agreement for non-payment as of March 5, 2009. There is no legal basis for the award of post-March 5, 2009 lost profits.

1. TSS Was Only Entitled To The Benefit Of The Bargain, Which Included Termination After Non-Payment

Lost profits damages in a contract case are limited by the agreement that the parties have made. "In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (Mich App 2007); *see also* M Civ JI 142.32 ("Damages for breach of contract may include lost profits. . . . Lost profits are a type of benefit of the bargain damages."). The "bargain" is the entire bargain described in the contract, which includes the obligations of both parties and the circumstances under which the benefits of the contract can be ended through early termination. One treatise explains:

> This rule governing the recovery of so-called direct and general damages necessarily requires the court to take into account not only the defendant's promised performance but the plaintiff's as well. Indeed, a failure to do so will frustrate the compensation principle by overcompensating the plaintiff, for he or she would otherwise receive what the defendant promised without the cost of performing his or her return promise.

24 Williston on Contracts § 64:1 (4th ed). Thus, one question that must be answered at the damages phase of a breach of contract case is, how long could the plaintiff have expected to obtain the benefits of the contract? In many cases, the answer will be the end of the term of the contract. However, where the parties have bargained for an early termination provision, and where that provision has been exercised, contract damages cannot extend past the termination date. Tab J, *Roll-Ice Int'l, LLC v V-Formation, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 19, 2006 (Case No. 264806), at *4 ("[A]t the time of the termination, plaintiffs' damages ceased to accrue."); *see also* Tab K, *Patel v Wyandotte Hosp & Med Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Apr. 29, 2003 (Case No.

230189), at *42-44 (limiting contract damages to those suffered prior to the date the defendant terminated the contract).

The bargain TSS made entitled it to the benefits of the contract until January 6, 2013, as long as, among other things, the contract was not terminated earlier for non-payment. TSS could have no expectation of profiting from the contract if it failed to pay for services rendered and if DHL terminated the contract on that basis.

It is undisputed that the contract contained a termination provision that DHL properly invoked for TSS's failure to pay for services rendered. TSS breached Section 16 of the contract in December 2008, when it stopped paying DHL for shipping services rendered. The Court of Appeals noted that TSS made its last payment to DHL on December 2, 2008, but that TSS continued to use DHL's shipping services through the first several months of 2009. App'x at 33a (Court of Appeals Opinion). At trial, TSS did not contest DHL's breach of contract counterclaim and conceded that it owed DHL $673,211 for unpaid shipping services. App'x at 359a-362a (Trial Tr. Vol. I). Because TSS continued to ship packages on credit and failed to pay for those shipments, DHL exercised its right under Section 17(c) to terminate the Reseller Agreement. App'x at 61a (TSS Notice of Non-Payment). As stated by the Court of Appeals, DHL sent a notice of non-payment and contract termination to TSS in February, and the Reseller Agreement terminated on March 5, 2009. App'x at 33a (Court of Appeals Opinion). This marked the end of the contract and the end of the time that TSS could expect to profit from the contract. The trial court should have respected the parties' agreement and limited damages to those profits TSS lost before March 5, 2009.

Ultimately, the trial court appears to have proceeded from a quasi-tort perspective. The trial court went so far as to say the following about DHL's alleged breach:

> The breach of contract was wrong, deliberate and intentional. I see no regard for the effect on Plaintiff. It is not right and strongly discourages Michigan businesses from promoting national and international business relations. . . . DHL destroyed TSSF and TSS. If this Court adopts Defendant's philosophy, then Plaintiff may secure next to nothing in exchange for the total loss of their business.[8]

App'x at 412a-413a (June 11, 2010 Hr'g Tr.).

Thus, from the trial court's perspective, awarding damages based only on the benefit of the bargain is insufficient, because it does not take into account the nature of DHL's breach and the nature of the harm to TSS. But as this Court has noted in rejecting extra-contractual damages in cases of so-called "bad faith" breach of contract:

> In the commercial contract situation, unlike the tort and marriage contract actions, the injury which arises upon a breach is a financial one, susceptible of accurate pecuniary estimation. The wrong suffered by the plaintiff is the same, whether the breaching party acts with a completely innocent motive or in bad faith.

Kewin v Mass Mut Life Ins Co, 409 Mich 401, 420; 295 NW2d 50 (1980).

The fundamental problem with the trial court's approach is that – unhinged from the terms of the contract – it violates the right of parties to contract freely. DHL and TSS are business entities that freely and voluntarily entered into each provision of the contract, including the payment and termination provisions. Enforcement of these provisions is guaranteed to the parties. A court should not refuse to enforce contract provisions merely because doing so would limit TSS's recovery in this case.

[8] In this instance, DHL's "philosophy" was that the law requires officers' salaries to be treated as an expense when calculating a corporation's lost profits. The Court of Appeals reversed the trial court's decision to allow TSS to treat officers' salaries as profit. App'x at 35a-37a (Court of Appeals Opinion).

2. The First Material Breach Rule Is Inapplicable

In prior briefs, TSS has argued that, notwithstanding the above, it should be able to recover damages through what would have been the full life of the contract because DHL supposedly committed the first material breach. There are two defects in this argument.

First, DHL did not commit the first material breach. TSS did. TSS breached in December 2008, when it failed to comply with the payment provisions of Section 16. There was no finding that DHL breached prior to January 31, 2009, when DHL discontinued domestic shipping services. The only determination of DHL's liability for breach of contract occurred at summary disposition. As the trial court stated in its findings of fact, "I granted partial summary disposition in favor of Plaintiff, having found Defendant did breach the contract when they discontinued domestic service to the Plaintiff." App'x at 402a (June 11, 2010 Hr'g Tr.). The trial court found that domestic shipping services continued until January 31 and that international deliveries were made "through at least March of '09." *Id.* at 406a.

Second, even if DHL had committed the first material breach, it would not matter, because TSS made an election to continue the contract by requesting and receiving performance from DHL. The Court explained this rule in *Schnepf v Thomas L McNamera, Inc*:

> Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election of either continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed of depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on this part. Anything which draws on the other party to execute the agreement after the default in respect of time or which shows that it is deemed a subsisting agreement after such default will amount to a waiver.

354 Mich 393, 397; 93 NW2d 230 (1958). Put another way, a "material breach of a contract does not obligate the nonbreaching party to terminate the contract; rather, that party can continue performing its own obligations and insist the other party do likewise. However, under no

circumstances may the non-breaching party stop his or her performance and continue to take advantage of the contract's benefits." 17B CJS Contracts § 754 (West 2013).

TSS continued to seek and accept DHL's contractual performance for domestic shipments through January 30, 2009, and for international shipments for several months thereafter – even after Plaintiffs sued for breach. App'x at 33a (Court of Appeals Opinion). Thus, TSS remained subject to the parties' contract and liable for its breaches of the contract. DHL also retained the right to terminate the contract for non-payment. When DHL did so, that ended DHL's obligation to provide services to TSS and therefore cut off any claim by TSS to damages incurred after March 5, 2009.

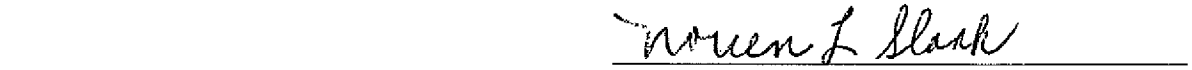
CONCLUSION AND RELIEF REQUESTED

The right to contract freely is diminished if courts do not apply contract and summary disposition law consistently and predictably, and if they do not enforce contracts as written. This case was not decided correctly, because the lower courts failed to apply the summary disposition standard, rewrote DHL's service obligations, refused to enforce DHL's right to terminate the contracts, and awarded contract damages not permitted by law.

The Court should reverse those portions of the judgment of the Court of Appeals in favor of Plaintiffs, reverse the trial court's order granting Plaintiffs summary disposition, and vacate the trial court's judgment awarding damages to Plaintiffs. The Court should remand the case to the trial court with instructions to enter judgment in favor of DHL on Plaintiffs' breach of contract claims or, in the alternative, remand to the trial court for a trial on Plaintiffs' breach of contract claim, with instructions that the trial court may not award TSS lost profits suffered before January 31, 2009 or after March 5, 2009.

Dated: July 18, 2014

COLLINS, EINHORN FARRELL P.C.



NOREEN L. SLANK (P31964)
Collins Einhorn Farrell P.C.
Attorney for Defendant-Appellant
4000 Town Center, Ste. 909
Southfield, MI 48075
Tel.: (248) 355-4141

DECHERT LLP

Christopher S. Ruhland (pro hac vice)
Andrew S. Wong (pro hac vice)
Amy L. Rudd (pro hac vice)
Attorneys for Defendant-Appellant
633 West 5th Street, 37th Floor
Los Angeles, CA 90071
Tel.: (213) 808-5700

TAB A

2003 WL 22928814
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Jeffrey EHLERT and Leanne Ehlert,
Plaintiffs-Appellees,
v.
Earl WISER and Roberta L Wiser,
Defendants-Appellants.

No. 239777. | Dec. 11, 2003.

Before: SMOLENSKI, P.J., and SAWYER and BORRELLO, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 In this action arising out of plaintiffs' purchase of defendants' business, defendants appeal as of right the trial court's judgment awarding plaintiffs $84,520.55. We affirm.

On November 4, 1998, plaintiffs and defendants entered into a buy/sell agreement in which plaintiffs agreed to purchase defendants' excavation business for $175,000. Both plaintiffs and defendant Earl Wiser signed the buy/sell agreement, but defendant Roberta Wiser did not, the reason for which is unclear. The buy/sell agreement contained an integration clause and a non-compete clause. In addition to the non-compete clause in the buy/sell agreement, the parties also executed a separate non-compete agreement, which both defendants signed. On July 6, 2000, plaintiffs filed a complaint against defendants alleging that defendants breached the non-compete agreement, intentionally misrepresented material facts, and negligently misrepresented the condition of the business value and asset conditions. Plaintiffs sought a permanent injunction to stop defendants from violating the non-compete agreement and requested monetary damages.

Following a bench trial, the trial court entered a judgment for plaintiffs and awarded plaintiffs damages in the amount of $84,520.55. Specifically, the trial court awarded plaintiffs $25,023 .60 for damages arising out of the condition of equipment that was conveyed to plaintiffs as part of the business, $24,510 for damages arising out of defendants' breach of the non-compete agreement, $24,000 in exemplary damages, and $750 for accounts receivable. The remainder of the damage award was for interest, costs, and attorney fees. The trial court entered the judgment against both defendants.

Defendants first argue that the trial court erred in relying on financial documents prepared by defendant Roberta Wiser in finding that defendants' conduct was fraudulent. According to defendants, the trial court's reliance on an income projection document and an estimated annual expense document should have been precluded by the parol evidence rule because the parties' buy/sell agreement had an integration clause that merged "all contemporaneous or prior negotiations" into the buy/sell agreement. Therefore, defendants contend, any prior representations made regarding business income or expenses should have been precluded by the integration clause. The legal effect of a contractual clause is a question of law that this Court reviews de novo. *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich. 362, 369; 666 NW2d 251 (2003).

The parol evidence rule is summarized as follows:

> The parol evidence rule provides that, when two parties have made a contract and have expressed it in a writing which they both have agreed to as being a complete and accurate integration of that contract, extrinsic evidence of antecedent and contemporaneous understandings and negotiations is inadmissible for the purpose of varying or contradicting the writing. [*Van Pembrook v. Zero Mfg Co,* 146 Mich.App 87, 97-98; 380 NW2d 60 (1985).]

*2 The parties' buy/sell agreement included an integration clause, which provided as follows:

> 21. Entire Agreement. This Agreement contains the entire agreement of the parties with respect to its subject matter; provided, however, that the terms

> and conditions of any related real estate Buy and Sell Agreement of even date are incorporated by reference, and any default under either this Agreement or that Buy and Sell Agreement shall constitute a default under both Agreements. All contemporaneous or prior negotiations have been merged into this Agreement, and this Agreement may be modified or amended only by written instrument signed by the parties to this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

When interpreting a contract, this Court first looks to the plain language of the contract. *Wilkie v. Auto-Owners Ins Co,* 469 Mich. 41, 61; 664 NW2d 776 (2003). The goal in the construction or interpretation of any contract is to honor the intent of the parties. *UAW-GM Human Resource Ctr v. KSL Recreation Corp,* 228 Mich.App 486, 491; 579 NW2d 411 (1998)." " 'his Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." " ' *Id.,* quoting *Sheldon-Seatz, Inc v. Coles,* 319 Mich. 401, 406-407; 29 NW2d 832 (1947), quoting *Michigan Chandelier Co v. Morse,* 297 Mich. 41, 49; 297 NW 64 (1941). Furthermore, courts are not to create ambiguity where none exists.*Id.* Contractual language must be construed according to its plain and ordinary meaning, and this Court must avoid technical or constrained constructions. *Id.* at 491-492.

The integration clause in the buy/sell agreement provides, in relevant part, that "[a]ll contemporaneous or prior negotiations have been merged into this Agreement."In drafting the integration clause, the parties elected to restrict the integration clause to include all prior negotiations but not prior representations. If the parties had intended the integration clause to preclude consideration of prior representations, they should have drafted the integration clause to read as follows: "All contemporaneous or prior negotiations *and representations* have been merged into this Agreement."The parties did not draft the integration clause so broadly. This Court does not have the authority to redraft contracts for parties when the words used by them are clear, unambiguous, and have a definite meaning. *UAW-GM, supra* at 491.Thus, we accept the clause as written and refuse to interpret it to include prior representations.

Defendants next argue that the trial court erred in finding that defendants committed fraud regarding the condition of the equipment. According to defendants, there can be no fraud when plaintiffs had the opportunity and ability to inspect the equipment and discover its condition before they purchased it.

*3 When reviewing a judgment following a bench trial, the trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. MCR 2.613(C); *Lamp v. Reynolds,* 249 Mich.App 591, 595; 645 NW2d 311 (2002). Defendants rely on *Schuler v. American Motors Sales Corp,* 39 Mich.App 276; 197 NW2d 493 (1972), to support their contention that there can be no fraud in this case because plaintiffs had the opportunity and ability to discover the condition of the equipment. In *Schuler, supra,* the plaintiff claimed that the defendant made material misrepresentations with respect to the new car inventory and the parts and accessories inventory of the business in which he purchased stock. The evidence showed, however, that all the representations made by the defendants were contained in financial statements and supporting schedules. Although the plaintiff had not read all the supporting schedules, he had been given the schedules to read and had signed each one. This Court rejected the plaintiff's argument that the defendants defrauded him, stating, "Plaintiff cannot show a misrepresentation by ignoring a part of the information supplied him, and then later claim he was defrauded because he was not told of the facts which he chose to ignore."*Id.* at 279.According to this Court, "there is no fraud where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant."*Id.* at 280.

We find that defendant's reliance on *Schuler* misplaced. *Schuler* is factually distinguishable from the instant case. In the matter before us, the buy/sell agreement warranted that the equipment would be in good working condition. Conversely, in *Schuler,* the information was supplied to the plaintiff in a written document, and the plaintiff chose to ignore it. Here, defendants did not provide plaintiffs with any written information regarding the poor condition of the equipment, and there is no indication that plaintiffs ignored information that was available to them regarding the condition of the equipment. Finally, in *Schuler,* the plaintiff could have easily discovered the fraud simply by reading the schedule. In contrast, in the instant case, it would have been much more difficult for plaintiff to discover the fraud. The equipment appraisal reveals that

there were forty-five separate pieces of equipment. According to plaintiff Jeffrey Ehlert's testimony, while some of the problems with the equipment were visually observable, generally, the problems could not have been discovered without actually operating the equipment. Furthermore, when Mr. Ehlert examined the equipment with the appraiser, the weather was extremely cold, so some of the equipment could not be started without plugging it in or pre-heating it. Because of these factual distinctions, we reject defendants reliance on *Schuler.*

In *Hayes Construction Co v. Silverthorn,* 343 Mich. 421, 426-427; 72 NW2d 190 (1955), the Supreme Court stated that when the seller has special knowledge on which the buyer would naturally rely, the parties do not stand on equal terms, and the buyer can rely on the seller's representations. In this case, defendants, as owners of the equipment, had special knowledge of the condition of the equipment. Given defendants' warranty in the buy/sell agreement regarding the condition of the equipment and the large number of equipment items, it was reasonable for plaintiff to visually inspect the equipment and rely on defendants' representations that the equipment was in good working condition or that it would be fixed. *Id.* Unlike the plaintiff in *Schuler,* who could have discovered any fraud simply by reading a schedule, plaintiff in the instant case did not have the ability to easily discover the fraud. We therefore conclude that our holding in *Schuler* does not preclude the trial court's finding of fraud. Because defendants had special knowledge of the condition of the property and because it would have been very difficult for plaintiffs to ascertain the working condition of each of the 45 pieces of equipment, the parties did not stand on equal terms, and plaintiffs had the right to rely upon defendants' representations regarding the condition of the equipment.

*4 Defendants next argue that the trial court erred in awarding plaintiffs exemplary damages in the amount of $25,000. This Court reviews a challenge to damages in a bench trial for clear error. MCR 2.613(C); *Peterson v. Dep't of Transportation,* 154 Mich.App 790, 799; 399 NW2d 414 (1986). However, to the extent that the proper measure of damages revolves around a question of law, this Court's review is de novo. See *Cardinal Mooney High School v Mich. High School Athletic Ass'n,* 437 Mich. 75, 80; 467 NW2d 21 (1991).

Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings. *McPeak v. McPeak (On Remand),* 233 Mich.App 483, 487; 593 NW2d 180 (1999). The purpose of exemplary damages in Michigan is not to punish the defendant, but to render the plaintiff whole.*Hayes-Albion Corp v. Kuberski,* 421 Mich. 170, 187; 364 NW2d 609 (1984). When compensatory damages can make the injured party whole, exemplary damages should not be awarded. *Id.* In cases involving only a breach of contract, the general rule is that exemplary damages are not recoverable. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich. 401, 419-420; 295 NW2d 50 (1980). However, exemplary damages may be recoverable in a contract action if there is "tortious conduct existing independent of the breach."*Id.* at 420.To justify an award of exemplary damages, the act or conduct complained of must be voluntary, and the act must inspire feelings of humiliation, outrage, and indignity. *McPeak, supra* at 487.The act or conduct must be so malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's feelings. *Id.* at 490.Further, the injury to the plaintiff's feelings and mental suffering must be a natural and proximate result of the nature of the defendant's conduct. *Id.*

Here, defendants' contend that the trial court erroneously awarded $25,000 in what it characterized as exemplary damages. We find that the trial court's characterization of the award as exemplary damages was erroneous. The Court predicated its award by stating, in relevant part:

> Last, I am awarding damages for fraud, for the intentional misrepresentation by.... Defendants toward Plaintiffs. As I have already indicated here, I find that Defendants did make intentional, material misrepresentations. As I've already indicated, the misrepresentations by which, but for that, Plaintiffs never would have bought this property. The bank never would have loaned the money that they did to allow Plaintiffs to buy this property. And but for these material misrepresentations, plaintiffs would not be where they are now with equipment that they had to pay to get fixed, mortgage that they have to pay and business that they have lost.... Many of those things can never be restored or returned back to the Plaintiffs and as such, I believe that they are entitled to damages for that intentional misrepresentation.... Again, that being the income projections. Those were deliberate, they were

> prepared by Ms. Wiser, they were used for the Plaintiffs to rely on by Defendants and as we have found out, they were completely wrong.

*5 It appears that the trial judge did not award exemplary damages but rather compensated plaintiffs for damages resulting from defendants' intentional misrepresentations. Pursuant to MCR 7.216(7), this Court is empowered to "enter any judgment or order or grant further or different relief as the case may require."Thus, the damage award is proper if not construed as exemplary damages.

It would be a gross injustice to disallow the award of $25,000 simply because the trial court mislabeled the award as "exemplary damages." It is clear from the record that the trial court awarded this sum because of defendants' gross misrepresentations of many matters, foremost of which were the income projections. Roberta Wiser prepared an annual income of $210,000 for the business, but later plaintiff Jeffrey Ehlert saw that defendants' tax return reflected a gross annual income of $80,000. The trial court awarded plaintiffs $25,023.60 for equipment repairs. Even if this Court upholds the trial court's award of $25,000 for intentional misrepresentation, plaintiffs are still behind at least $8,000 from income defendants' projections, when we add the totality of the trial court's award and actual income plaintiffs earned. We therefore find that the trial court merely mislabeled the award of $25,000 as exemplary damages, but properly awarded plaintiffs $25,000 as compensation for the intentional misrepresentations of defendants.

Defendants also argue that the trial court erred in entering the judgment against defendant Roberta Wiser and in failing to differentiate the damages awarded against each defendant. Additionally, defendants argue that plaintiffs failed to sustain their burden of proving with a reasonable degree of certainty the damages they suffered as a result of defendants' breach of the non-compete agreement.

We find that the trial court did not err in entering the judgment against defendant Roberta Wiser. The evidence supports the trial court's entering the judgment against her with respect to each damage award. Regarding the $25,023.60 in damages awarded for the condition of the equipment, the evidence showed that defendant Roberta Wiser made representations regarding the condition of the equipment. While she did not sign the buy/sell agreement, she was present when that agreement was signed, and she signed all the other documents relating to the purchase of the business, including the property transfer affidavit, the warranty deed, the non-compete agreement, and the bill of sale for the equipment. Moreover, there was evidence that defendant Roberta Wiser helped run the business and was very active in consummating the sale of the business. Therefore, the trial court properly assessed the damages based on the condition of the equipment against defendant Roberta Wiser. For the same reasons, the trial court also properly assessed $750 in damages for accounts receivable against defendant Roberta Wiser.

The trial court also properly held defendant Roberta Wiser liable for $24,510 in damages resulting from defendants' breach of the non-compete agreement. The evidence showed that defendant Roberta Wiser signed the non-compete agreement. Within one month after she signed the agreement, defendant Roberta Wiser approached plaintiffs with a proposal to amend the non-compete agreement, saying that defendant Earl Wiser needed to work. In addition, defendant Earl Wiser violated the non-compete agreement, in part, by helping a former employee start up an excavating business on land owned by both defendants. Accordingly, defendant Roberta Wiser was liable for damages for breaching the non-compete agreement.

*6 We decline to address defendants' argument that the trial court erred in failing to differentiate the damages awarded against each defendant. Because defendant failed to raise the issue of apportionment of damages between defendants at trial, this issue is waived. *Leavitt v. Monaco Coach Corp,* 241 Mich.App 288, 301-302; 616 NW2d 175 (2000).

Finally, we reject defendants' argument that plaintiffs failed to sustain their burden of proving the damages from defendants' breach of the non-compete agreement with reasonable certainty. Defendants are correct that a party asserting a claim has the burden of proving its damages with reasonable certainty. *Berrios v. Miles, Inc,* 226 Mich.App 470, 478; 574 NW2d 677 (1997). Damages based on speculation or conjecture are not recoverable. *Id.* However, when a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise. *Severn v. Sperry Corp,* 212 Mich.App 406, 415; 538 NW2d 50 (1995). Further, where reasonable minds could differ regarding the level of certainty to which damages have been proved, this Court is careful not to invade the fact finding of the jury and substitute its own judgment. *Id.* At the outset, we note that before they breached the non-compete agreement, defendants acknowledged that it would be difficult to determine damages resulting from a breach of the agreement. The non-compete agreement, which both defendants signed, specifically states, "The parties hereto acknowledge that upon a breach of this AGREEMENT by

WISER, EHLERT'S damages may be irreparable or impossible to measure."At trial, plaintiff husband testified regarding the damages the business suffered as a result of defendant Earl Wiser working for Shook Asphalt. While plaintiff could not articulate a specific dollar amount, he stated that his business suffered damages because Shook Asphalt was doing jobs that his business could have been doing. Plaintiff asserted that, on average, 20% of his business was asphalt work and that defendant Earl Wiser told him that the business normally earned $35,000 to $45,000 annually doing asphalt work.

Ultimately, the trial court awarded plaintiffs $24,510 in damages for defendant's violation of the non-compete agreement. The trial court arrived at this damage figure by adding $144,740 (the appraised value of the equipment), $5,000 (the value of the land), and $750 (accounts receivable), and subtracting that total ($150,490) from $175,000, the purchase price for the business. We believe that the damage award for the breach of the non-compete agreement was appropriate in light of evidence that twenty percent of plaintiffs' business involved asphalt work and, according to defendants' income projections, the business earned $210,000 annually. Plaintiffs proved that they suffered damages, and, contrary to defendants' argument on appeal, they did not have to prove the amount of their damages with mathematical precision.

*7 Affirmed

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TAB B

2007 WL 28409

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

J & B SAUSAGE COMPANY, Plaintiff-Appellant,
v.
DEPARTMENT OF MANAGEMENT & BUDGET and Department of Education, Defendants-Appellees.

Docket No. 259230. | Jan. 4, 2007.

Court of Claims; LC No. 04-000091-MK.

Before: BORRELLO, P.J., and SAAD and WILDER, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right an order of the Court of Claims granting summary disposition to defendants on its breach of contract and breach of duty of good faith and fair dealing claims. We affirm in part, reverse in part and remand.

Plaintiff and defendants entered into two agreements for the processing of United States Department of Agriculture (USDA) donated pork. The first agreement, the "Processing Agreement," was "for the processing of ... [USDA] donated commodity Pork Picnics into Fully Cooked Morning Sausage Rolls for the Michigan Department of Education for use by various schools across the State of Michigan."The second agreement, the "Ancillary Agreement," outlined the various requirements plaintiff was to adhere to in the actual processing of this pork.

The parties commenced performance under these agreements. Defendants ordered and caused 40,000 pounds of USDA pork to be delivered to plaintiff. Plaintiff processed this first shipment into 8,491 cases of sausage rolls. Pursuant to the terms of the agreement, defendants then ordered delivered approximately 1,600 of these cases, the balance remaining in storage in plaintiff's care, until further ordered deliveries. Defendants then ordered and caused an additional 40,000 pounds of USDA pork to be delivered to plaintiff for further processing. Plaintiff processed this second shipment into 8,117 cases of sausage rolls. The approximately 15,000 remaining cases remained in storage in plaintiff's care, pursuant to the agreement.

Thereafter, defendants sent plaintiff a letter indicating that, due to budget constraints, they were requesting a price reduction on the agreement. Plaintiff rejected defendants' request and, over a period of communications, demanded delivery of the remaining sausage rolls. Defendants made no further requests for such deliveries. Plaintiff then tendered the sausage rolls to defendants; defendants essentially ordered them delivered to various food banks. Plaintiff then instituted the instant litigation, claiming breach of contract and breach of a duty of good faith and fair dealing. Defendants sought summary disposition, which the Court of Claims granted.

I

As a threshold matter, we must determine whether this agreement is governed by general common law contract principles or the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.* Article 2 of the UCC governs "transactions in goods." MCL 440.2102. Contracts for services are governed by the common law.*Citizens Ins Co v. Osmose Wood Preserving,* 231 Mich.App 40, 45; 585 NW2d 314 (1998). Where a contract is mixed, providing both goods and services, or is otherwise unclear, our Supreme Court has examined it under the "predominant purpose" test to determine whether to apply the common law or the UCC. *Farm Bureau Mut Ins Co v. Combustion Research Corp,* 255 Mich.App 715, 722-725; 662 NW2d 439 (2003).

> "The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved ... or is a transaction of sale, with labor incidentally involved...."*[Neibarger v. Universal Cooperatives, Inc,* 439 Mich. 512, 534; 486 NW2d 612 (1992), quoting *Bonebrake v. Cox,* 499 F.2d 951, 960 (CA 8, 1974).]

*2 The Court has further instructed:

> A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser's ultimate goal is to acquire a product, the contract

> should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service. [*Id.* at 536.]

This issue is generally one of fact. However, "[w]here there is no genuine issue of any material fact regarding the provision of the contract, a court may decide the issue as a matter of law."*Frommert v. Bobson Constr Co,* 219 Mich.App 735, 738; 558 NW2d 239 (1996).

We conclude that this agreement was predominantly for services. It was "for the processing of ... [USDA] donated commodity Pork Picnics into Fully Cooked Morning Sausage Rolls."This is a service agreement. Defendants had pork delivered to plaintiff, which was processed, and then returned to defendants. See *Insul-Mark Midwest, Inc v. Modern Materials,* 612 N.E.2d 550, 554-557 (Ind, 1993) (holding that a contract for the rust-proofing of delivered and returned screws was one for service); *Wells v. 10-X Mfg Co,* 609 F.2d 248, 255 (CA 6, 1979) (holding that a contract for the provision of "manpower and machine capabilities for production of a hunting shirt," with materials supplied by the buyer, was a service contract). Plaintiff acquired no ownership over the pork. The parties agreed that the contract would be a "fee-forservice" agreement, representing plaintiff's "cost of ingredients (other than donated pork), labor, packaging, overhead, and other costs incurred in the conversion of the donated pork into the specified end product."Defendants' ultimate goal was to have the pork processed. Thus, the common law governs our analysis.

II

Plaintiff first argues that the Court of Claims erred in concluding that the parties' agreement was a requirements contract. We agree. We review rulings on motions for summary disposition de novo. *McClements v. Ford Motor Co,* 473 Mich. 373, 380; 702 NW2d 166 (2005). A motion brought pursuant to MCR 2.116(C)(10) entitles the movant to summary disposition where there is no genuine issue of material fact. *Miller v. Purcell,* 246 Mich.App 244, 246; 631 NW2d 760 (2001). We consider "the pleadings, depositions, admissions, and documentary evidence" submitted by the parties in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Nastal v. Henderson & Assoc,* 471 Mich. 712, 721; 691 NW2d 1 (2005). Also, issues of contract interpretation are questions of law we review de novo. *Rory v. Continental Ins Co,* 473 Mich. 457, 464; 703 NW2d 23 (2005). Our primary obligation is to discern and effectuate the parties' intent. *Quality Products & Concepts Co v. Nagel Precision, Inc,* 469 Mich. 362, 375; 666 NW2d 251 (2003). Unambiguous contract language is enforced as written. *Id.*

*3 A requirements contract is one in which "the quantity term is not fixed at the time of contracting [and t]he parties agree that the quantity will be the buyer's needs or requirements of a specific commodity or service" over the life of the contract. Corbin, Contracts (rev ed), § 6.5, p 240. While the UCC expressly validates such agreements, see MCL 440.2306(1), Michigan courts have historically recognized the validity of "requirements" contracts. *E G Dailey Co v. Clark Can Co,* 128 Mich. 591; 87 NW 761 (1901); *Hickey v. O'Brien,* 123 Mich. 611; 82 NW 241 (1900). Such contracts are accordingly creatures of the common law and may be recognized in the context of service agreements governed by the same.

Historically, requirements contracts that have been validated have included express language indicating the nature of the agreement. For example, this Court, in the context of a tin can supply agreement, concluded that a manufacturer had agreed to provide another "with all that it would use," while the latter "agreed to buy all the cans it would use" in the business at issue.*E G Dailey, supra* at 594.In *Hickey v. O'Brien,* in the context of an agreement for the sale of ice, one party agreed to supply another "with all the ice that they [sic] may require to carry on their ice business," and the other agreed to purchase "all the ice necessary to carry on their [sic] ice business."*Hickey, supra* at 612.

In finding there was a requirements contract here, the Court of Claims relied upon the following language in the agreement:

> Exact quantities to be purchased are unknown.... Quantities specified, if any are estimates based on prior purchases and/or anticipated USDA shipments, and the State is not obligated to purchase in these or any other quantities. It is anticipated that 1 truck of Pork Picnics will be available to the processor.... If as in the past, Pork Picnics are purchased, the contractor shall be

> responsible for processing the Pork Picnics according to the attached requirements. The state is not obligated to request processing in these amounts or any other quantities.

Read as a whole, and in context, this language governs the procurement of raw pork from the USDA; it does not establish a quid-pro-quo quantitative relationship between the parties. *Hickey, supra* at 612; Corbin, Contracts (rev ed), § 6.5, p 240; see also *Wilkie v. Auto-Owners Ins Co,* 469 Mich. 41, 50 n 11; 664 NW2d 776 (2003) (construing contracts as a whole). The first sentence indicates that the amount of USDA pork the parties agreed to process was undefined. The second sentence is informed by the first through a contextual relationship: It indicates that any amounts of USDA pork specified in the contract, such as amounts specified in the sentence that follows, are but estimates of what would be available to plaintiff for processing. The second clause of this sentence, upon which the Court of Claims relied, merely precludes a determination that defendants were obligated to procure *any* USDA pork for plaintiff to process. It does not, despite the court's conclusion, make the purchase of processed pork from plaintiff discretionary, based upon defendants' requirements. *Nagel Precision, supra* at 375.It makes the procurement of *raw USDA pork, for plaintiff's processing,* discretionary. Similarly, the last sentence makes it clear that defendants were not obligated to request *any* pork processing from plaintiff, in amounts estimated or otherwise. Rather than establishing a requirements contract, these two provisions, in conjunction, vitiate any claim that defendants were obligated to employ plaintiff's processing services at all.[1]We therefore conclude that the Court of Claims erred in ruling the parties' agreement to be a requirements contract. Thus, the Court of Claims erred in granting summary disposition for defendants on this basis.

III

*4 Plaintiff next argues that the Court of Claims erred in concluding that it was neither required nor authorized to process any received USDA pork, upon receipt, delivered at defendants' behest. We agree. Again, our primary obligation in contract interpretation is to discern and effectuate the intent of the parties. *Nagel Precision, supra* at 375.Unambiguous contract language is enforced as written. *Id.* As a matter of interpretation, we construe contracts as a whole. *Wilkie, supra* at 50 n 11.We "must ... give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory."*Klapp v. United Ins Group Agency, Inc,* 468 Mich. 459, 468; 663 NW2d 447 (2003).

The parties' agreement provides, in the context of defendants' proposed procurement of pork, that "[i]f as in the past, Pork Picnics are purchased, the contractor shall be responsible for processing the Pork Picnics according to the attached requirements."This provision unambiguously required plaintiff to process any USDA pork it received, according to the contract terms. See *Oakland Co v. State,* 456 Mich. 144, 155 n 10; 566 NW2d 616 (1997) (employing the presumption that "shall" is mandatory). A logical construction of the clause "according to the attached requirements" is necessarily broad, encompassing both the balance of the Processing Agreement as well as the Ancillary Agreement. *Nagel Precision, supra* at 375; *Wilkie, supra* at 50 n 11.The latter expressly governs the particulars of pork processing, including for example, pork processing and handling procedures, processing quality control, packaging, and distribution. The former generally governs the parties' relationship, outlining the requirements and rights of each, including quality of the processed product, service and distribution, general contracting requirements, and contract termination. Defendants argue that the above language "imposes an obligation that is subject to other requirements in the Processing Contract, *and does not authorize [plaintiff] ... to commence processing without regard to other considerations.*" Yet defendants fail to identify what "other requirements" or "other considerations" in the agreement limit plaintiff's duty to process according to the preceding clause. Indeed, no such limitations are present. The foregoing language is accordingly sufficient to conclude that the Court of Claims erred in ruling that the parties' agreement neither authorized nor required plaintiff to process the pork it received. However, it need not be construed to require plaintiff's processing of pork *upon receipt.*

The parties' agreement further provides:

> The contractor [plaintiff] shall only process the amount of commodity delivered by USDA as directed by [defendant Michigan Department of Education (MDE)] or designee. The contractor should not anticipate the receipt of additional product. No production in excess of delivered amount of USDA commodity food should occur unless directed and authorized by

MDE.

*5 The first sentence requires plaintiff to process amounts of pork delivered by the USDA at the behest of defendants, *and only that commodity delivered.* In other words, only defendants could direct USDA pork to be delivered, and only that pork directed by defendants for delivery could be processed by plaintiff. The third sentence reinforces this, recognizing that defendants retained the option to authorize production above and beyond that USDA pork they ordered delivered. *Nagel Precision, supra* at 375. Implicit in these provisions is that plaintiff was obligated to process any received USDA pork. Indeed, the third sentence is rendered surplusage unless it is understood that plaintiff was authorized and obligated to process any pork received *upon receipt, without defendants' further authorization.* Otherwise, no circumstance would arise in which plaintiff would process pork independent of defendants' express, contemporaneous authorization to do so, obviating any need to limit plaintiff's processing authority to existing USDA inventory. *Klapp, supra* at 468. Plaintiff was thus to process any received USDA pork *upon receipt, without further authorization from defendants.*

The Court of Claims concluded that, because the parties' agreement permits defendants to order that USDA pork be processed into other pork products, apart from morning sausage rolls, plaintiff's processing the entire shipment precluded defendants from exercising their contractual rights. This determination was in error. "A cardinal principle of construction is that a contract is to be construed as a whole, and all parts are to be harmonized as far as possible." *Czapp v. Cox,* 179 Mich.App 216, 219; 445 NW2d 218 (1989). Language in the agreement permits defendants to modify the agreement so as to order plaintiff to process received USDA pork into any one of plaintiff's various products. This provision can be implemented prior to defendants' order of USDA pork; it can be implemented midway through plaintiff's production. In other words, plaintiff's beginning production upon receipt of USDA pork may have precluded implementation of this language *with respect to product already processed,* but it does not preclude such implementation *altogether.* The Court of Claims' construction of this section failed to construe it in harmony with other contract provisions. *Id.* It was accordingly erroneous.

Defendants argue that, because plaintiff was required to store unprocessed USDA pork for extended periods of time, it follows that plaintiff was not required to process such pork upon receipt and without their further authorization. In support of this position, defendants marshal a litany of contract provisions directly or tangentially relating to the storage of unprocessed USDA pork. They misapprehend and misconstrue these various provisions, however. That plaintiff was contractually obligated to provide raw pork storage does not speak to any required authorization for processing. A construction in harmony with other contract provisions is that plaintiff was required to provide appropriate storage facilities for raw USDA pork during its processing of the same. *Czapp, supra* at 219. That plaintiff was required to maintain a raw pork inventory for production, to report its inventory use to defendants, and to furnish a security bond for any pork it received, does not preclude a determination that plaintiff was both authorized and required to process the USDA pork upon receipt. Our construction gives effect to every provision in the agreement. *Klapp, supra* at 468.

*6 Defendants further argue that because the Ancillary Agreement gives them "the option of transferring donated pork rather than requiring ... [plaintiff] to process all of it," plaintiff could not have been required to process all the USDA pork it received. Again, defendants misconstrue the meaning of the language they reference. Rather than permit defendants to transfer USDA donated pork from plaintiff to other entities, the Ancillary Agreement precludes plaintiff from transferring the same. It is not an affirmative grant of authority, but a negative restriction on it. *Nagel Precision, supra* at 375.

IV

Plaintiff next argues that it was entitled to summary disposition, pursuant to MCR 2.116(C)(10), on its breach of contract and breach of duty of good faith and fair dealing claims. We disagree. In order to prevail on a motion for summary disposition under MCR 2.116(C)(10) on a breach of contract claim, plaintiff must establish both the elements of a contract and the breach of it. *Pawlak v. Redox Corp,* 182 Mich.App 758, 765; 453 NW2d 304 (1990). "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v. Leja,* 187 Mich.App 418, 422; 468 NW2d 58 (1991); *Hess v. Cannon Twp,* 265 Mich.App 582, 592; 696 NW2d 742 (2005). Plaintiff must then demonstrate a breach of the parties' agreement, see *Baith v. Knapp-Stiles, Inc,* 380 Mich. 119, 126-127; 156 NW2d 575 (1968), and damages. See *Lawrence v. Will Darrah & Assoc, Inc,* 445 Mich. 1, 6-8; 516 NW2d 43 (1994).

Plaintiff has failed to establish that no genuine issue of

material fact remains as to whether defendants breached the parties' agreement.[2]The Processing Agreement provided as follows:

> Deliveries shall be made as requested by the Department of Education or their [sic] designee as indicated. The Contractor [plaintiff] shall deliver the finished products to the warehouses. The state reserves the right to add, delete or change distribution centers and/or percentages of usage during the course of the Contract period or extension thereof. Other specific delivery requirements will be made between each warehouse and the Contractor. Deliveries may be required weekly, bi-weekly or on a monthly basis.
> * * *
> The contractor shall store products processed until ordered by warehouses.

As evidenced by plaintiff's pleadings, the parties' course of performance broke down. Plaintiff alleges that this breakdown was caused by defendants' letter requesting a price reduction. The subsequent course of performance is unclear, however. Communications between the parties have been alleged but not fully documented in the record. Plaintiff's tender of the goods occurred approximately 11 months after defendants' letter was sent. There is no indication what occurred in the interim. The parties' contract is clear: plaintiff was required to store the processed pork until such time as it was ordered by defendants. At the same time, defendants were obligated to order sausage rolls and remit payment for plaintiff's service. While defendants' letter requesting a price reduction evinces uncertainty in their future performance, the record does not disclose whether, through subsequent communications or otherwise, defendants repudiated their obligations under the agreement. See e.g., *Stoddard v. Manufacturers Nat'l Bank,* 234 Mich.App 140, 163; 593 NW2d 630 (1999) (discussing anticipatory repuduation). The record is insufficiently developed from which to conclude that defendants breached the parties' agreement. Because genuine issues of material fact remain, summary disposition is not appropriate. *Miller, supra* at 246.

*7 Plaintiff likewise argues that it was entitled to summary disposition on its breach of a duty of good faith and fair dealing claim. However, "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing."*Belle Isle Grill Corp v. Detroit,* 256 Mich.App 463, 476; 666 NW2d 271 (2003). Plaintiff's claim was properly dismissed.

We affirm the denial of summary disposition in favor of plaintiff, reverse the grant of summary disposition in favor of defendants, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Parallel Citations

61 UCC Rep.Serv.2d 677

Footnotes

1 This does not foreclose a finding that an enforceable agreement existed, however. The above-quoted language specifically indicating that, "[i]f as in the past, Pork Picnics are purchased, the contractor shall be responsible for processing the Pork Picnics according to the attached requirements," and its analytical implications, might appear to render the parties' agreement an illusory promise; defendants were not obligated to do anything in consideration of plaintiff's promise to process received pork. See Restatement Contracts, 2d, § 77, comment a, p 195 ("Illusory promises. Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise."); *Hess v. Cannon Twp,* 265 Mich.App 582, 592; 696 NW2d 742 (2005) (requiring for contract enforcement competency in contracting parties, legal subject matter, consideration, mutual agreement and mutual obligation). Because, however, defendants allegedly ordered that USDA pork be delivered to plaintiff for processing, supplying the necessary consideration, an enforceable agreement exists based upon this course of performance. See *Shepherd Hardwood Products Co v. Gorham Bros,* 225 Mich. 457, 465; 196 NW 362 (1923); *Cooper v. Lansing Wheel Co,* 94 Mich. 272, 276-277; 54 NW 39 (1892).

2 It is therefore unnecessary for us to determine whether plaintiff has satisfied the *Thomas* elements. *Thomas, supra* at 422.

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TAB C

1999 WL 33545512

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Superior Court of North Carolina, Guilford County, Business Court.

WESTPOINT STEVENS, INC. and The Bibb Company, Plaintiffs,
v.
PANDA-ROSEMARY CORPORATION, and Panda-Rosemary, L.P., Defendants.

No. 99-CVS-9818. | Dec. 16, 1999.

{ 1} This matter is before the Court on cross motions for summary judgment. Each party to the contracts at issue contends that it is entitled to final judgment as a matter of law based upon a legal interpretation of certain clauses in the contracts, which each party asserts contain unambiguous language. For the reasons set forth below, the Court finds that partial summary judgment may be entered with respect to some of the issues. However, if the Court is correct in its interpretation of the contracts, genuine issues of material fact remain to be determined with respect to the central issue governing this dispute.

Attorneys and Law Firms

Moss and Mason, by Joseph W. Moss and Matthew L. Mason; Sutherland Asbill & Brennan LLP, by James A. Orr, William R. Wildman and John A. Chandler, for Plaintiff WestPoint Stevens, Inc.

Moore & Van Allen, PLLC, by James P. McLoughlin, Jr. and Meredith W. Holler, for Plaintiff The Bibb Company.

Young, Moore & Henderson, PA, by John N. Fountain; Haynes & Boone, L.L.P., by Werner A. Powers and Ernest Martin, Jr. for Defendants Panda-Rosemary Corporation and Panda-Rosemary, L.P.

Opinion

ORDER AND OPINION

I.

*1 { 2} A significant number of facts are not in dispute in this matter. Plaintiff, The Bibb Company ("Bibb"), and Defendant, Panda Energy Corporation ("Panda Energy"), entered into a Cogeneration Energy Supply Agreement in January 1989, which provided for Panda Energy to construct and operate a "cogeneration facility" adjacent to Bibb's textile mill in Roanoke Rapids, North Carolina known as the "Rosemary Complex." A "cogeneration facility" is a power plant that produces useful energy in the form of electricity and steam. Typically, a cogeneration facility will enter a Power Purchase Agreement ("PPA") to provide electricity to a nearby utility and contemporaneously will enter a contract to provide energy to a "thermal host." In this case, Panda Energy entered into a PPA with the Virginia Electric Power Company ("VEPCO") to provide electricity to VEPCO, and entered into the Energy Supply Agreement with Bibb to provide energy to Bibb in the form of steam and to refrigerate, or "chill," Bibb's water. Under the PPA, Panda Energy acts as one of VEPCO's backup sources for electricity during peak periods and provides electricity to VEPCO when it is "dispatched" by VEPCO.

{ 3} In entering into the PPA and Cogeneration Energy Supply Agreement, Panda benefited from the federal regulatory scheme generally known as "PURPA" (the Public Utility Regulatory Policies Act). PURPA's purpose is to promote energy efficiency by giving certain breaks to power plants that provide useful energy. In order to receive these breaks under PURPA, power plants must maintain an efficiency rating known as "QF" (qualifying facility). Panda's agreement with VEPCO depended on Panda securing a long-term thermal host and on Panda's long-term provision of energy to its thermal host. Panda maintains its QF status by meeting a certain overall requirement for plant efficiency and providing a percentage of its energy output to the Rosemary Complex in the form of useful thermal energy.

{ 4} Through a series of assignments and guarantees, all of Panda Energy's rights, title, interest, and obligations under the Cogeneration Energy Supply Agreement were assigned to the Defendants, Panda-Rosemary Corporation and later to Panda-Rosemary, L.P. (collectively, "Panda"). On October 1, 1989, a First Amendment to the Cogeneration Energy Supply Agreement was executed by and between Panda-Rosemary Corporation, Panda Energy Corporation and Bibb. The Cogeneration Energy Supply Agreement and the First Amendment thereto are referred to herein collectively as the "CESA." The CESA provides that Panda, the "Supplier," will supply, and Bibb, the "Purchaser," will purchase, all of the Purchaser's requirements for steam and chilled water for the Rosemary Complex. Paragraph 5.01 of the CESA sets the

price for steam at $1.00 per 1,000 pounds of steam for the first 45,000 pounds, and $2.50 per 1,000 pounds of steam for all steam over 45,000 pounds. Paragraphs 3.01 and 21.04 of the CESA expressly provide that Bibb is required only to purchase its actual requirements for steam and chilled water and is not required to consume any minimum quantity of steam or chilled water. Furthermore, pursuant to Paragraph 2.06(b) of the CESA Panda is required to deliver the chilled water to Bibb at 45° F. Bibb, as Supplier, estimated that the plant should normally use between 30,000 and 100,000 pounds of steam per hour. *See* Paragraph 2.02 of the CESA. In addition, although Bibb had no minimum purchase obligation, Panda was required to have the capacity to supply an annual average of 65,000 pounds of steam per hour and up to 2,000 tons of chilled water for 8,000 hours. *See* Paragraph 2.06 of the CESA. Furthermore, the CESA provides that "[d]eliveries of quantities in excess of [these stated averages] will not be required hereunder."*Id.* In summary, this is a requirements contract with no minimum and a maximum cap.

*2 { 5} Until February of 1997, Bibb purchased all of its steam and chilled water requirements for the Rosemary Complex from Panda. In February 1997, Bibb sold the Rosemary Complex to WestPoint Stevens, Inc. ("WestPoint") pursuant to an Asset Purchase Agreement dated February 13, 1997. As part of the sale of its Rosemary Complex, pursuant to an Assignment and Assumption Agreement, Bibb assigned all of the rights it possessed under the CESA to WestPoint. Defendants acknowledge that Paragraph 21.08 of the CESA expressly permits Bibb, as Purchaser, to assign its rights under the CESA to WestPoint without the approval of Panda. However, Panda takes the position that Bibb's "rights" did not include the right to receive its requirements of steam and chilled water. WestPoint purchased the plant and equipment; it did not purchase or continue to run Bibb's operation at the plant. WestPoint did continue to operate the plant as a textile mill. As a result of the sale, Bibb ceased to have any requirements for steam and chilled water at the Rosemary Complex. WestPoint requires steam and chilled water to operate the Rosemary Complex for its business.

{ 6} Plaintiffs acknowledge that Paragraph 21.04 of the CESA expressly requires Bibb to cause any party to whom it sold or leased the plant to assume Bibb's obligations under the CESA, subject to Defendants' approval, if such buyer or lessee had requirements for steam or chilled water. Accordingly, Bibb required WestPoint, as part of the sale of the Rosemary Complex, to assume all of Bibb's obligations to Defendants under the CESA, subject to Panda's approval. For the purposes of this motion only, the parties do not dispute that Panda was not given the opportunity to approve the assumption by WestPoint of Bibb's obligations *prior* to the execution of the WestPoint-Bibb Asset Purchase Agreement. Panda has refused to approve WestPoint's assumption of Bibb's obligations.

{ 7} Since purchasing the Rosemary Complex, WestPoint has purchased from Panda and paid for all of its requirements for steam and chilled water, pursuant to the contract terms and at the contract price. Those payments have been accepted by Panda under protest.

{ 8} The concept of cogeneration produces a mutually beneficial and interdependent relationship. The operator of the cogeneration facility needs a thermal host and has a source of revenue to supplement sales of electricity. The thermal host obtains its steam at reduced costs but becomes dependent on the cogeneration facility for the host's manufacturing operation to run smoothly. In this case the thermal host also leased the land upon which the cogeneration facility was located to the operator, thus making the operator's use of its premises dependent on good relations with the host. This was a long-term requirements contract which bound the parties together for twenty-five years. This symbiotic relationship between host and operator pervades the questions surrounding interpretation of the language in these contracts.

II.

*3 { 9} North Carolina courts recognize the use of partial summary judgment under Rule 56(d) of the North Carolina Rules of Civil Procedure to simplify cases by disposing of those issues ripe for summary judgment. N.C.G.S. § 1A-1, Rule 56(d); *See Case v. Case,* 73 N.C.App. 76, 325 S.E.2d. 661,*rev. denied,*313 N.C. 597, 330 S.E.2d 606 (1985); *Hill Truck Rentals, Inc. v. Hubler Rentals, Inc.,* 26 N.C.App. 175, 215 S.E.2d. 398 (1975). Partial summary judgment is appropriate in this case where the parties seek the Court's interpretation of contractual language within the four corners of the CESA between Bibb and Panda.

{ 10} Because the parties agree that the CESA is unambiguous, and because the effect to be given unambiguous language in a contract is a question of law for the Court, there is no genuine issue of material fact as to some of the issues relevant to the pending cross motions for partial summary judgment. *See Runyon v. Paley,* 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992),

*rev. denied,*337 N.C. 699, 448 S.E.2d 541 (1994) (citing *Lane v. Scarborough,* 284 N.C. 407, 200 S.E.2d 622 (1973) (interpretation of unambiguous language is a question of law for the court); *see also, Hagler v. Hagler,* 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987); *First-Citizens Bank & Trust Co. v. 4325 Park Rd. Associates, Ltd.,* 515 S.E.2d 51, 54 (N.C.App.), *rev. denied,*1999 N.C. LEXIS 965 (N.C.1999); *Department of Transp. v. Idol,* 114 N.C.App. 98, 100, 440 S.E.2d 863, 864 (1994); *Cleland v. Children's Home, Inc.,* 64 N.C.App. 153, 156, 306 S.E.2d 587, 589 (1983) (all recognizing the well established principle that plain and unambiguous language in a contract is to be interpreted by the court as a matter of law).

III.

{ 11} As a preliminary issue, this Court is asked to determine whether the substantive law of North Carolina, Texas, or some other state applies to the CESA.[1]The choice of law inquiry is governed by the Uniform Commercial Code ("UCC") because the CESA involves a contract for the sale of goods.N.C.G.S. § 25-2-102.

{ 12} Under the UCC, the term "goods" is defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities ... and things in action."N.C.G.S. § 25-2-105(1); Tex. Bus. & Com.Code § 2.105. In essence, goods are all things which are movable at the time of identification to the contract for sale. *See Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro,* 105 N.C.App. 258, 265-66, 412 S.E.2d 910, 915,*rev. denied,*332 N.C. 148, 149 S.E.2d 573 (1992); *Zepp v. Mayor & Council of Athens,* 348 S.E.2d 673, 677 (Ga.App.), *cert. denied* (1986); *Moody v. City of Galveston,* 524 S.W.2d 583, 586 (Tex.Civ.App.1975).

{ 13} In *Mulberry-Fairplains,* the North Carolina Court of Appeals recognized that water being supplied and sold was "goods" under the UCC because "[w]hatever can be measured by a flow meter has 'movability' as that term is used in connection with the definition of goods."105 N.C. at 266, 412 S.E.2d at 915 (quoting N.C.G.S. § 25-2-105(1), official commentary (1986)). Thus, water was found to be movable goods as "evidenced by the fact that defendant charges plaintiff for the water it supplies by the number of gallons plaintiff consumes per month."*Id.*

*4 { 14} In this case, Paragraph 5.01 of the CESA sets the price for steam at $1.00 per 1,000 pounds of steam for the first 45,000 pounds, and $2.50 per 1,000 pounds of steam for all the steam over 45,000 pounds. Clearly, Panda measures the amount of steam supplied each month in order to determine the amount of money owed to it. This is further evidenced by Section 6 of the CESA, which states: "The purchase prices paid pursuant to '5' above shall be paid in calendar month increments within fifteen (15) days after receipt of an invoice from SUPPLIER. Payment shall be required for the actual quantity of steam and chilled water delivered during the prior month ."Similarly, the CESA measures the price for chilled water supplied by Panda by the ton, and requires the provision of "up to two thousand (2,000) tons of chilled water" per year. The Court recognizes that the terms "pounds" and "tons" in this context refer to a unit of energy rather than weight. *See* Thorpe Aff. ¶ 8. Nevertheless, such terms provide a method of measurement for determining payment to Panda. Because the steam and chilled water were measured by Panda in order to receive payment, the CESA contemplates the sale of goods and the UCC should apply to the CESA. The CESA also provides in Paragraph 3.01 that Purchaser will buy all the steam and chilled water that it "consumes" at the plant. A requirements contract by its very nature implies a sale of goods, and thus the application of the UCC. *See, e.g., Monarch Photo, Inc. v. Qualex, Inc.,* 935 F.Supp. 1028 (D.N.D.1996) ("For there to be a requirements contract, the UCC must be applicable"). Thus, the steam and chilled water should be considered "goods" and the CESA is governed by the UCC.

{ 15} Having determined that the UCC applies, the Court must look to the UCC's provision regarding which state's law governs the disputes before the Court. The UCC permits the parties to a contract to stipulate the governing state law, provided that state has a reasonable relationship to the transaction. *See*N.C.G.S. § 25-1-105(1); *Wohlfahrt v. Schneider,* 82 N.C.App. 69, 74, 345 S.E.2d 448, 451 (1986); *Kaplan v. RCA Corp.,* 783 F.2d 463, 465 (4th Cir.1986). The parties to the CESA contracted for North Carolina to be the "Applicable Law" governing interpretation of the CESA. Section 19 of the CESA entitled "Applicable Law" references only North Carolina; Paragraph 19.01 clearly states: "This Agreement shall be deemed to be performable in the State of North Carolina."(strike-out in original). This reference to North Carolina as the "Applicable Law" is by definition unambiguous, and its words must be given their literal meaning.[2]*See Hunsinger,* 386 S.E.2d at 539, 192 Ga.App. at 783; *Coker,* 650 S.W.2d at 393; *Runyon,* 331 N.C. at 305, 416 S.E.2d at 186. Accordingly, the Court should give meaning to the language of Section 19 of the CESA and apply North Carolina law to this dispute.

*5 { 16} Even had the parties not explicitly provided for North Carolina law to govern the CESA, North Carolina law governs this dispute pursuant to the UCC's choice of law rule, which requires the application of North Carolina law to "transactions bearing an appropriate relation to this State."N.C.G.S. § 25-1-105(1). North Carolina courts interpreting this statute have held that the provision is controlling on choice of law questions in cases arising under the UCC in which the parties did not contractually select which state's law would control. *See Mahoney v. Ronnie's Rd. Service,* 122 N.C.App. 150, 468 S.E.2d 279, 281 (1996), *aff'd,*345 N.C. 631, 481 S.E.2d 85 (1997) (citing *Bernick v. Jurden,* 306 N.C. 435, 442, 293 S.E.2d 405, 410 (1982)). The "appropriate relation standard" has been held to require courts to apply North Carolina law when North Carolina has the " 'most significant relationship' to the transaction in question."*See id.*(quoting *Boudreau v. Baughman,* 322 N.C. 331, 338, 368 S.E.2d 849, 855 (1988)). In determining which state bears the "most significant relationship" to the dispute, courts look to the place of sale, manufacture, distribution, delivery, and use of the product, as well as the place of injury. 322 N.C. at 338, 368 S.E.2d at 855-56; 122 N.C.App. at 154-55, 468 S.E.2d at 282.

{ 17} In the case at hand, North Carolina bears the most significant relationship to the CESA and the dispute arising thereunder, therefore compelling the application of North Carolina law pursuant to N.C.G.S. § 25-1-105. North Carolina is the site of the manufacture, sale, delivery and consumption of the steam and chilled water sold under the CESA, as well as the site of the alleged injuries. The CESA's "most significant" and "appropriate" geographic relationship is to North Carolina, and it should thus be governed by North Carolina law. N.C.G.S. § 25-1-105; *Boudreau,* 322 N.C. at 338, 368 S.E.2d at 855-56; *Mahoney,* 122 N.C.App. at 154-55, 468 S.E.2d at 281-82.

IV.

{ 18} The Court must next determine what rights Bibb possessed and could assign to a purchaser of the Rosemary Complex.

{ 19} Bibb contends that it is entitled to summary judgment based upon an interpretation of the CESA that holds that it had the right to assign to a purchaser of the Rosemary Complex the right to purchase the new owner's steam and chilled water requirements at the Rosemary Complex on the terms and conditions in the CESA.

{ 20} On the other hand, Panda contends that it is entitled to summary judgment based upon an interpretation of the CESA that holds that Bibb did not have any right to purchase steam and chilled water under the agreements and thus could not assign any such right to a purchaser of the Rosemary Complex. Alternatively, Panda argues that it had the right to reject assignment of Bibb's contract rights to any purchaser of the Rosemary Complex for any reason.

{ 21} For the reasons set forth below, the Court concludes that neither side is correct and that Bibb possessed the right to assign to a purchaser of the Rosemary Complex the right to purchase the new owner's requirements for steam and chilled water, but that that right was subject to the approval of Panda. Panda's right to approve was subject to the standard of good faith and fair dealing. It was not an unfettered right to reject a purchaser for any reason it chose.

A.

*6 { 22} The CESA explicitly permits Bibb to assign all of *its* rights without approval and without limitation. Paragraph 21 .08 is unambiguous:

> This AGREEMENT shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, in accordance with the terms hereof. Either party hereto and [sic] may assign its *rights* hereunder without approval but may not delegate its *obligations* without the express written approval of the other party. (emphasis supplied)

{ 23} Panda admits that Paragraph 21.08 gave Bibb the ability to assign to WestPoint whatever rights it had under the CESA, but contends that Bibb had no right to purchase steam and chilled water, only an obligation to do so. This position defies reason and common sense. A requirements contract is generally defined as a contract in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller. *See Black's Law Dictionary* 1304 (6th ed.1990) (citing *Bank of Am. Nat'l Trust & Sav. Ass'n v. Smith,* 336 F.2d 528, 529 (9th Cir.1964).

Although the buyer does not agree to purchase any specific amount, the requisite mutuality and consideration for a valid contract is found in the legal detriment incurred by the buyer in relinquishing his right to purchase from all others except from the seller. *See Propane Industrial, Inc. v. General Motors Corp.*, 429 F.Supp. 214, 218 (W.D.Mo.1977). Thus, in this case, Panda's promise to supply Bibb's requirements corresponds to Bibb's right to receive the same. Bibb's obligation under the CESA was to obtain its steam and chilled water exclusively from Panda. A purchaser's promise under a requirements contract is not a promise to buy or to sell any specific amount of the goods; rather, it is a promise not to buy such goods from a third party. *Id.* § 569. In this case, Bibb promised not to supply its own steam and chilled water. In return, Panda made a promise to sell and deliver all such goods as the buyer may order within reason and in good faith (subject to the maximum cap).*Id.*

{ 24} It is clear that Bibb's primary right under the CESA was the right to obtain all of Bibb's requirements for steam and chilled water for twenty-five years at the fixed contract price.[3]The corresponding purchase obligation insures that Panda will receive payment for all the steam and chilled water it supplies and Bibb consumes. To hold otherwise would require the Court to give no effect to Paragraph 13.01(vii) of the CESA, pursuant to which Bibb had the right to declare Panda in default if it failed to supply the minimum quantities of steam or chilled water specified in the CESA. This Court must construe a contract in a manner that gives effect to all of its provisions. *Johnston County, N.C. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992). This Court cannot condone a contract interpretation that would render contract provisions meaningless. *McDonald v. Medford,* 111 N.C.App. 643, 433 S.E.2d at 231 (1993).

*7 { 25} If Bibb had been purchased by Dan River, Inc. (as it subsequently was) and had continued its operations at the Rosemary Complex without materially changing its operations, there can be no doubt that Bibb could have assigned its rights to receive steam and chilled water at the contract price to Dan River or any other successor company which continued Bibb's operations at the facility. In order to protect Bibb's power to buy steam and chilled water needed to operate the Rosemary Complex at the fixed price set forth in the contract, that very purchase right must be freely assignable, and Paragraph 21.08 made it so. Although the express terms of the CESA control this case, the UCC contemplates and attempts to facilitate the assignability of requirements and output contracts when a business is sold by providing that acceptance of the assignment by the assignee constitutes an assumption of the assignor's duties under the contract, and that if the contract remains in force, "requirements in the hands of the new owner continue to be measured by the actual good faith ... requirements under the normal operation of the enterprise prior to sale."*See*N.C.G.S. § 25-2-210(4) (1999); N.C.G.S. § 25-2-306 (official commentary 1999).

B.

{ 26} Panda takes the position that it was a breach of contract for Bibb to sell the facility without its approval. That position is without merit. Bibb clearly had the power to sell the Rosemary Complex without Panda's approval. First, there is no paragraph that gives the "Supplier" of steam and chilled water any right to approve a sale or lease of the plant it neither owns nor controls. Second, Paragraph 21.04 of the CESA assumes such a sale or lease without a veto right:

> Should the Plant be sold or leased to a third party at any time during the term hereof and should the operation of the Plant (after such sale) require the consumption of steam and/or chilled water, PURCHASER shall (subject to SUPPLIER's approval) require the purchaser or lessee thereof to assume the obligations of this AGREEMENT.

It is clear from the language of this provision that sale of the plant and the required consumption of steam and/or chilled water are conditions precedent to the duty to require the buyer of the plant to assume the obligations under the CESA and to seek Supplier's approval for that assumption. Despite the unambiguous language of paragraph 21.04, the Defendants contend that Bibb was required to obtain Panda's consent prior to its sale or lease of the Rosemary Complex. Defendants' argument can only rely on an incorrect interpretation of Paragraph 21.04, in which Defendants read the parenthetical "subject to supplier's approval" to qualify a clause in which it does not appear, i.e., "[s]hould the plant be sold or leased to a third party."Further, this construction would turn the condition precedent into the promise. This false construction contravenes basic rules of English grammar and the well-settled law that requires the court to give the language its ordinary meaning and read the language in the only reasonable light. *See C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g. Co.*, 326 N .C. 133,

142, 388 S.E.2d 557, 563 (1990); *Hunsinger,* 386 S.E.2d at 539; 192 Ga.App. at 782.

C.

*8 { 27} The CESA's grant of the power to assign to a purchaser of the business the right to buy a textile plant's steam and chilled water requirements makes no sense without the same power to sell or lease the plant that generates those requirements, nor should the CESA be read to give a supplier of a commodity the right to tie up the plant owner's ability to sell a textile mill representing a major asset of the corporation for 25 years absent clear and unambiguous language granting that power. Bibb extends its right of assignment argument to encompass the right to assign the right to purchase steam and chilled water at the contract price to *any* purchaser of the Rosemary Complex. In other words, Bibb would have the Court interpret the contract to read that the *requirements* were those of the *facility* and not Bibb as the owner and operator of the facility. Panda objects to that interpretation.

{ 28} The Court agrees that Bibb did not have the unfettered right to assign its rights to purchase steam and chilled water to any purchaser of the plant. This decision is based upon the specific language of the CESA, the nature of the relationship between the parties, a review of the agreement in its entirety and the application of well-accepted contract law.

{ 29} Bibb's rights under the CESA included the right to have *its* requirements met. When Bibb sold the plant (as opposed to the enterprise) to WestPoint, it no longer had any requirements, and thus there was no practical right for Bibb to assign. Therefore, upon the sale of the plant, Bibb could not transfer to WestPoint the right to receive Bibb's requirement for steam and chilled water. The language of Section 21.04 quoted above clearly contemplates approval by Panda prior to effective assignment of the contract to a purchaser of the facility. The parenthetical phrase "subject to SUPPLIER's approval" appearing in that section cannot be interpreted in any other way. Section 21.04 deals specifically with the factual situation at hand. Bibb has sold the Rosemary Complex (the Plant) to a third party and that third party requires steam and chilled water. The general language of Section 21.08, permitting Bibb to assign its rights, must yield to the specific language of Section 21.04, which addresses the possibility that Bibb could sell the plant without selling its enterprise.

{ 30} The relationship between the parties and the structure of the entire agreement support such an interpretation. Panda required an acceptable thermal host to maintain its standing as a "qualifying facility" under PURPA. It would make no sense for Panda to agree to provide steam and chilled water to a party who might not qualify as an acceptable thermal host. Nor could it agree to provide steam and chilled water to a thermal host whose requirements interfered with or negatively impacted its ability to sell electricity as required by its contract with VEPCO. Common sense dictates that Panda would want to be protected from assignment to a third party that entailed such adverse consequences.

*9 { 31} The Court's interpretation of the contract is also supported by application of general principles of contract law involving requirements contracts. In addressing assignment of requirement contracts, Corbin explains as follows:

> There are other contracts in which one party promises to supply and the other party promises to buy all of the latter's needs or requirements. There is no doubt that the former party has the power to assign his right to payment; and in many cases the performance promised by him is not so personal as to prevent him from delegating it to another. There is no doubt, either, that the latter party, the buyer, can assign the right that his needs and requirements shall be supplied. But observe that it is his own needs and requirements that are to be supplied, not those of the assignee; he cannot by assignment change in any material way the performance to be rendered by the other party.

Arthur L. Corbin, *Corbin on Contracts,* § 884 (1993). The rationale behind this rule is that where obligations to be performed under a contract involve a degree of personal skill and confidence then it must have been intended by the parties that the obligations would not be performed by a third party to the contract. *See Goldschmidt & Loewenick, Inc. v. Diamond State Fibre Co.,* 186 A.D. 688, 695, 174 N.Y.S. 800, 805 (1919).

{ 32} Whether the rights or duties are too personal to be assigned turns upon the intention of the parties. *See*6 Am.Jur.2d *Assignments* § 29 (1999). The nature of an agreement between a qualifying facility and a thermal

host support the conclusion that Bibb's right to purchase steam and chilled water was personal to Bibb's enterprise and could not be freely assigned to a purchaser of the plant. Thus, this Court concludes that Panda had the right to approve the assignment to WestPoint of Bibb's contract rights to steam and chilled water prior to that assignment becoming effective.

D.

{ 33} Panda contends that its right to approve the assignment to WestPoint was unencumbered in any way and that it could reject WestPoint without reason or justification. Panda's position is without merit.

{ 34} Every contract governed by the UCC imposes upon the parties an obligation of good faith in its performance or enforcement. *See*N.C.G.S. § 25-1-203. In cases involving a lessor's withholding of consent to the assignment of a lease, the courts have found that there is an implied duty of good faith, even absent a provision prohibiting the unreasonable or arbitrary withholding of consent. *See, e.g., Prestin v. Mobile Oil Corp.,*1984 U.S.App. LEXIS 19217 (9th Cir.1984); *Schweiso v. Williams,* 150 Cal.App.3d 883; *Pacific First Bank v. The New Morgan Park Corp.,* 319 Ore. 342, 876 P.2d 761 (1994). The duty of good faith requires a party to exercise discretion reasonably and in a manner consistent with the parties' expectations. *Management Services of Illinois, Inc. v. Health Management Systems, Inc.,* 907 F.Supp. 289, 295 (C.D.Ill.1995). The question of whether consent was unreasonably withheld involves questions of fact that were not before the Court and thus is reserved.

***10** { 35} The application of the duty of good faith and fair dealing in the context of this requirements agreement is consistent with general contract law which focuses on the materiality of the differences in the performance required when a requirements contract is assigned. However, Corbin recognizes that there are requirements contracts

> in which the extent and character of the performance to be rendered are fixed with a reasonable degree of certainty by matters not affected by an assignment.... In such cases, the assignor does not attempt by his assignment to change the extent and character of the performance; he does not attempt to substitute a new party's needs and requirements for his own.... Thus, a contract to supply the needs and requirements of a specific factory, plant, or going concern is one where the extent of the performance is usually not dependent upon the personality of the owner who makes the contract. Usually, some variation in the extent of performance, due to ordinary changes in plant, personnel, or in business conditions, is contemplated by the parties when the contract is made....*In cases of this type, the problem to be solved is whether the performance to be rendered by the obligor is materially affected by the change in ownership and management.*(emphasis supplied)

Arthur L. Corbin, *Corbin on Contracts* § 884 (1993).*See also*N.C.G.S. § 25-2-306, which provides:

> A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

{ 36} For example, if the purchaser of the Rosemary Complex converted it to a dyeing and finishing operation that had significantly different requirements and uses for steam and chilled water than a weaving plant, and the new requirements would impair Panda's ability to meet its electricity supply obligations to VEPCO, such a change would be material and could support a good faith refusal to agree to the assignment. On the other hand, if there was no material change in Panda's required performance and if Panda's refusal was being used solely to extract a higher price for steam or chilled water, such refusal would not be in good faith. Between those ends of the spectrum, many issues could arise with respect to uses by a new purchaser. However, both parties would have a vested interest in resolving those issues. WestPoint would be adversely affected by having to restart the old boilers and supply its own steam. Panda would be adversely affected by the loss of a thermal host.

{ 37} Materiality must be assessed by looking at the terms of the contract. This contract contained stated estimates of quantities to be provided. There was no minimum and there was a maximum cap. Those contract provisions could be significant in determining materiality of different uses by a new occupant of the Rosemary Complex. In any event, the materiality of the differences in performance required by the new occupant, viewed in light of the existing contract terms, would provide the most significant, but not the only, determinant of good faith. Issues of materiality and good faith are generally fact intensive and not appropriate subjects for summary judgment.

***11** { 38} Furthermore, the requirement that Bibb condition any sale of the Rosemary Complex upon the purchaser's acceptance of the CESA carries with it a contractual duty on the part of Panda to make its approval determination in good faith and a spirit of fair dealing. Absence of a good faith requirement would mean that a new owner would not only be committed to the fixed contract price with no ability to negotiate a lower price, but would also be subject to Panda's demand to raise the price if the new owner did not want to restart the old boilers.

E.

{ 39} Paragraph 21.04 of the CESA required Bibb to cause any party to whom it sold or leased the Rosemary Complex and whose operation of the plant required steam and/or chilled water to assume Bibb's obligations under the CESA, subject to Panda's approval. Because Bibb sold the Rosemary Complex to WestPoint, and because WestPoint does have a need for steam and chilled water at the Rosemary Complex, Bibb had the duty to compel WestPoint to assume Bibb's obligations. It is an undisputed fact that Bibb required WestPoint to assume all of Bibb's obligations to Defendants under the CESA, subject to Panda's approval, and WestPoint agreed to do so. As a result, WestPoint became obligated to purchase any steam and chilled water which it required at the Rosemary Complex-again, subject to Panda's approval. Nothing in the language of Paragraph 21.04 required Bibb to seek Panda's approval prior to requiring WestPoint to assume its obligations.

{ 40} There has been no breach of contract arising out of Bibb's attempt to require WestPoint to assume Bibb's obligations under the CESA. Under North Carolina law, an assignment is deemed ineffective if a required consent is not obtained. *See Edgewood Knoll Apartments, Inc. v. Braswell,* 239 N.C. 560, 80 S.E.2d 653,*reh'g denied,*240 N.C. 760, 83 S.E.2d 797 (1954) (concluding that assignment of bond was incomplete when consent of surety was required for assignment and was not given). If the Defendants validly withheld consent, the result is that the assignment was ineffective and the obligations under the CESA remain with Bibb under North Carolina law.

{ 41} The Asset Purchase Agreement between Bibb and WestPoint echoes the common law, and provides that an *ineffective assignment* of obligations will have no effect on the parties' rights, duties and obligations under the CESA. Paragraph 6.16(a) of the Asset Purchase Agreement provides as follows:

> *To the extent that* any Assumed Contract is not capable of being transferred or assigned by Seller to Buyer (a "*Transfer*") without the consent, approval or waiver of a third party or other entity, or if such Transfer or attempted Transfer would constitute a breach of such Assumed Contract or a violation of any law, statute, rule, regulation, ordinance, order, code, arbitration award, judgment, decree or other legal requirement of any governmental entity, nothing in this Agreement will constitute a Transfer or an attempted Transfer thereof. (emphasis added).

***12** Pursuant to this language, if, as claimed by the Defendants, their refusal to approve WestPoint's assumption of Bibb's obligations was proper, then Bibb's rights have not been assigned, but Bibb remains obligated to the Defendants under the CESA, and no breach of the CESA has occurred as a result of WestPoint's attempted assumption thereof, notwithstanding Defendants' refusal to grant their consent to such assumption.

{ 42} The result of an ineffective assignment of obligations is not that Bibb breached the CESA. The mere attempt to assign its obligations to WestPoint was not a breach which caused damage, nor does it give Defendants the right to renegotiate the contract and extort a higher price from WestPoint for steam and chilled water. A breach of contract occurs when a party materially fails to perform an obligation under the contract. *See Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.,* 86 N.C.App. 506, 510, 358 S.E.2d 566 (1987). Whether or not WestPoint assumes Bibb's obligations, there can be no damage to Defendants because under North Carolina law and the WestPoint-Bibb Asset Purchase Agreement, Bibb is still bound by the CESA. Accordingly, Panda cannot show any material breach of contract or damages. In fact, Defendants are in the same position now that they would have been in had Bibb never assigned the CESA. There is no breach arising out of WestPoint's attempted

assumption of Bibb's obligations.

F.

{ 43} The CESA and the right to assign all rights thereunder are unique, irreplaceable and invaluable assets. Therefore, Bibb and WestPoint cannot be compensated adequately in money damages if it is determined that Defendant's refusal to acknowledge the assignment of Bibb's rights under the CESA to WestPoint is wrongful. Because a present, actionable and justiciable controversy exists with respect to the legal rights between the parties under the CESA, including the rights and obligations of Bibb, WestPoint and the Defendants thereunder, the use of declaratory judgment in this case is proper. *See Blades v. City of Raleigh,* 280 N.C. 531, 544, 187 S.E.2d 35, 42-43 (1972); *Integon Indem. Corp. v. Universal Underwriters Ins., Co.,* 131 N.C.App. 267, 507 S.E.2d 66, 68 (1998); *MGM Transp. Corp. v. Cain,* 128 N.C.App. 428, 430, 496 S.E.2d 822, 824 (1998).

Conclusion

{ 44} Cogeneration arrangements are inherently symbiotic relationships. Each party must be protected from being in business with a partner who could significantly impact its operation. On the other hand, both the textile industry and the energy supply industry are undergoing radical change which dictates that each party to a long-term contract governing cogeneration must have flexibility to restructure and change ownership. The imposition of the good faith and fair dealing requirement in connection with the approval of the right to assign provides the flexibility which the parties need to respond to changes within their own industries while preserving the basis for a sound working relationship. In this case, if Bibb and WestPoint can prove that Panda's refusal to agree to the assignment of Bibb's contractual rights to receive steam and chilled water at the contract price was a breach of its duty of good faith and fair dealing, they will be entitled to relief. If Panda did not violate its duty of good faith and fair dealing, Panda and WestPoint will be left to either negotiate a new contract or each go their separate ways. Bibb will have no "requirements" for steam and chilled water at the Rosemary Complex.

*13 { 45} WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT

1. Plaintiffs' motion for partial summary judgment as to Defendants' counterclaim that Bibb breached the express terms of the CESA is hereby GRANTED.

2. Plaintiffs' motion for partial summary judgment on Counts I and II of the Second Amended Complaint is hereby GRANTED, and the Court enters the following declaratory judgment:

a. Pursuant to Section 21.08 of the CESA, Bibb had the right to assign its rights under the CESA to WestPoint without Defendants' consent; therefore, Bibb did not breach the CESA by assigning its rights thereunder to WestPoint;

b. Pursuant to Section 21.04 of the CESA, Bibb had the right to sell the Rosemary Complex to WestPoint without Defendants' consent; therefore, Bibb did not breach the CESA by selling the Rosemary Complex to WestPoint; and

c. The Defendants' right to approve Bibb's assignment to WestPoint of its rights to receive steam and chilled water under the CESA is subject to a contractual duty of good faith and fair dealing, and genuine issues of material fact exist with respect to Plaintiffs' claim that Defendants breached that duty.

3. Defendants' Motion for Partial Summary Judgment is hereby GRANTED to the limited extent Defendants seek a determination that Defendants possessed the right to approve assignment to WestPoint of the contract rights to receive WestPoint's requirements for steam and chilled water at the contract price. In all other respects Defendants' Motion for Partial Summary Judgment is DENIED.

CERTIFICATION

Pursuant to Rule 54 of the North Carolina Rules of Civil Procedure, the Court certifies that there is no just reason for delay in entering this Order or the appeal therefrom.

Parallel Citations

1999 NCBC 11

Footnotes

1 In fact, the choice of law issue is important with respect to only one question. Both Texas and North Carolina law hold that interpretation of unambiguous contract language is for the court as a matter of law. *See Croker v. Croker,* 650 S.W.2d 391, 393 (Tex .1983); *Davis v. Dennis Lilly Co.,* 330 N.C. 314 (1991). Defendants contend that outside of the UCC, Texas does not recognize a duty of good faith and fair dealing. North Carolina clearly does. *See Claggett v. Wake Forest Univ.,* 126 N.C.App. 602 (1997). The importance of this issue becomes clear in Section IV.C. below. For the reasons stated below, this Court finds that the UCC applies, and accordingly that the parties were bound by a duty of good faith and fair dealing. *See*N.C.G.S. § 25-1-203; Tx. Bus. & Com.Code § 1-203. For purposes of this opinion, the Court need not decide whether Texas would recognize a duty of good faith and fair dealing outside of the UCC.

2 On the issue of the parties' intent in drafting the CESA to provide for the applicable state law, this Court will not consider the parole evidence contained in Defendants' briefs. Under North Carolina law, "Where the language is clear and unambiguous, the court is obliged to interpret the contract as written, ... and cannot, under the guise of construction, 'reject what the parties inserted or insert what the parties elected to omit.' " *Corbin v.. Langdon,* 23 N.C.App. 21, 25, 208 S.E.2d 251, 254 (1974) (quoting *Weyerhaeuser Co. v. Carolina Power & Light Co.,* 257 N.C. 717, 719, 127 S.E.2d 539, 540 (1962), and citing *Root v. Allstate Ins. Co.,* 272 N.C. 580, 158 S.E.2d 829 (1967)). However, it is telling that numerous assignments, leases, and other documents which Panda entered into subsequent to the Cogeneration Energy Supply Agreement which relate to Panda's rights and obligations thereunder explicitly invoke the application of North Carolina law. It would make no sense for these documents, which indisputably bear on the rights and obligations under the CESA, to be governed by North Carolina law if the Defendant believed the underlying rights and obligations were in fact governed by Texas law.

3 Panda argues that Bibb had no right to receive steam or chilled water at a fixed price. Certainly the fixed prices were bargained for by Bibb. If Panda had attempted to raise its price as against Bibb, Bibb would have had an enforceable right to the fixed price. To argue that the fixed prices for Bibb's requirements are not rights of Bibb ignores reality. Panda did have the benefit of a cap on its obligations.

End of Document

TAB D

2010 WL 668039
Only the Westlaw citation is currently available.

United States District Court,
N.D. California.

BAXTER HEALTHCARE CORPORATION, et al.,
Plaintiffs,
v.
FRESENIUS MEDICAL CARE HOLDINGS, INC. d/b/a Fresenius Medical Care North America, et al., Defendants.

No. C 07-1359 PJH. | Feb. 19, 2010.

Opinion

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

PHYLLIS J. HAMILTON, District Judge.

*1 The parties' motions for partial summary judgment came on for hearing before this court on September 2, 2009. Plaintiffs appeared by their counsel David Callahan, Garret A. Leach, Mary Elizabeth Zaug, Joseph Reagan, and Maureen K. Toohey. Defendants appeared by their counsel Michael E. Florey, Mathias Samuel, and John W. Kozak. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS plaintiffs' motion in part, DENIES it in part, and DEFERS ruling on it in part, and GRANTS defendants' motion is part and DENIES it in part.

BACKGROUND

The background of this case is as set forth in the February 10, 2009 Order Construing Claims ("*Markman* Order"). Briefly, plaintiffs Baxter Healthcare Corporation, Baxter International, Inc., and Baxter Healthcare SA (collectively, "Baxter"), and DEKA Products Limited Partnership ("DEKA") filed this action on March 7, 2007, asserting nine patents against defendants Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medical Care North America, and Fresenius USA, Inc. (collectively, "Fresenius"). The patents involve or relate to systems and methods for performing peritoneal dialysis ("PD"), to assist patients suffering from end-stage renal disease.

Originally at issue were U.S. Patent No. 5,324,422 ("the '422 patent"); U.S. Patent No. 5,421,823 ("the '823 patent"); U.S. Patent No. 5,431,626 ("the '626 patent"); U.S. Patent No. 5,438,510 ("the '510 patent"); U.S. Patent No. 6,503,062 ("the '062 patent"); U.S. Patent No. 6,808,369 ("the ' 369 patent"); U.S. Patent No. 6,814,547 ("the '547 patent"); U.S. Patent No. 6,929,751 ("the '751 patent"); and U.S. Patent No. 7,083,719 ("the '719 patent").

On December 18, 2008, the court signed the parties' stipulation and proposed order staying the claims and defenses asserted as to the '751 and '719 patents. On May 28, 2009, the court signed the parties' stipulation and proposed order regarding the removal of functionality of Liberty Cycler, relating to the basis for Baxter/DEKA's assertion of claims of the '510, '062, and '369 patents. Thus, only the '823, '626, '422, and '547 patents are presently at issue.

In the present motions, Baxter/DEKA seek partial summary judgment as to certain invalidity contentions respecting all four of the patents at issue, and Fresenius seeks partial summary judgment as to the '823 patent and the ' 547 patent only. Fresenius also asserts that Baxter/DEKA's damages claim should be limited.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law.Fed.R.Civ.P. 56. Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

*2 A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a

genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Southern Calif. Gas. Co. v. City of Santa Ana,* 336 F.3d 885, 888 (9th Cir.2003).

On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case.*Celotex,* 477 U.S. at 324-25.If the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. *See*Fed.R.Civ.P. 56(e); *Anderson,* 477 U.S. at 250.

A patent is entitled to a presumption of validity, and the burden of proof falls on the party seeking to establish the invalidity of a patent claim, who must overcome the presumption of validity in 35 U.S.C. § 282 by clear and convincing evidence. *Metabolite Labs., Inc. v. Laboratory Corp. of America Holdings,* 370 F.3d 1354, 1365 (Fed.Cir.2004).

B. Baxter/DEKA's Motion

Baxter/DEKA argue that they are entitled to summary judgment, first, as to Fresenius' invalidity contentions that conflict with the court's construction of certain of the disputed terms; and second, as to invalidity contentions for which Fresenius has submitted no expert opinions.

1. Motion as to invalidity contentions that conflict with claims construction

Baxter/DEKA argue that they are entitled to summary judgment as to certain invalidity contentions, which they claim conflict with the court's construction of certain disputed terms. Baxter/DEKA assert that the "pressure conveying element" and "pressure transferring element" limitations of the '626 patent are not indefinite, and that the asserted claims of the '823, '626, and '422 patents are not invalid for failure to enable or describe actuation by a mechanical piston.

a. "pressure conveying element" and "pressure transferring element"

In its Final Invalidity Contentions, Fresenius alleges that under 35 U.S.C. § 112, ¶ 2, asserted Claims 34, 36-38, 41, 44, and 45 of the '626 patent are invalid because the term "pressure conveying element" is indefinite, and that asserted Claims 38, 40, 41, 44, and 45 of the '626 patent are invalid because the term "pressure transfer element" is indefinite. Fresenius contends further that the court's construction of "pressure conveying element" is indefinite because it defines the claimed element in terms of what it does, not what it is; and that "pressure conveying element" has no commonly accepted or understood meaning in the art, and a person of ordinary skill in the art would therefore not be able to determine the structural boundaries of the claimed "pressure conveying element."[1]

*3 Section 112, ¶ 2 requires that the specification "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."35 U.S.C. § 112, ¶ 2. Under this provision, "[t]he definiteness of a claim term depends on whether that term can be given any reasonable meaning."*Datamize, LLC v. Plumbtree Software, Inc.,* 417 F.3d 1342, 1347 (Fed.Cir.2005). Thus, a claim is indefinite if a person of ordinary skill in the art would not understand its scope when reading the claim in light of the specification. *See, e.g., Halliburton Energy Servs., Inc. v. M-I LLC,* 514 F.3d 1244, 1249 (Fed.Cir.2008).

Generally, indefiniteness is a question of law to be determined by the court.*Union Pac. Res. Co. v. Chesapeake Energy Corp.,* 236 F.3d 684, 692 (Fed.Cir.2001). However, the indefiniteness inquiry may involve underlying questions of fact. *See BJ Servs. Co. v. Halliburton Energy Servs., Inc.,* 338 F.3d 1368, 1372 (Fed.Cir.2003) ("Like enablement, definiteness, too, is amenable to resolution by the jury where the issues are factual in nature."). In particular, where evidence beyond the claims and the written description may be reviewed, factual issues may arise. *See, e.g., Dow Chem. Co. v. NOVA Chems. Corp. (Canada),* 629 F.Supp.2d 397, 402-04 (D.Del.2009).

In the *Markman* Order, the court construed the disputed term "pressure conveying element" as used in asserted Claims 34, 38, 41, and 44 of the '626 patent as having a "plain and ordinary meaning" because the term involved "commonly understood words." *Markman* Order at 12. The court also found that the claims themselves explained what the "pressure conveying element" is used for-"conveying fluid pressure to the diaphragm to operate the pump chamber and valve."*Id.* The court noted particular pressure-conveying elements described in the specification, but concluded that the '626 patent does not suggest that "pressure conveying element" is limited to any particular embodiment, and that therefore "specific pressure conveying components cannot be read into the claim."*Id.*

Baxter/DEKA argue that because the court was able to construe this term, it cannot be indefinite under § 112, ¶ 2. They also note that Fresenius' recent invalidity contentions repeat the same arguments that Fresenius made in claim construction, which were rejected by the court. Finally, Baxer/DEKA assert that "pressure transfer element" is not indefinite under 35 U.S.C. § 112, ¶ 2, as the claim construction and validity analysis of this term "mirrors" the analysis the court undertook to construe "pressure conveying element."

Baxter/DEKA contend that because Fresenius' arguments for indefiniteness of the "pressure transfer element" limitation are identical to those it raises for the "pressure conveying element," the court should reject them for the same reason. They argue that although neither party found it necessary for the court to construe the term "pressure transfer element," the court previously addressed nearly identical issues in construing "pressure conveying element." Thus, according to Baxter/DEKA, for the same reason that "pressure conveying element" is not indefinite, the court should find that "pressure transfer element" is not indefinite.

***4** Fresenius argues, however, that a person of ordinary skill would not be able to translate "pressure conveying element" (or the unconstrued "pressure transfer element") into a meaningfully precise claim scope. Fresenius claims that because "pressure conveying element" has no commonly accepted or understood meaning in the art, a person of ordinary skill in the art would not be able to determine the structural boundaries of the claimed limitation, and thus would not be able to determine whether a device includes a structure covered by the claimed "pressure conveying element."

Fresenius also argues that the court's construction of "pressure conveying element" provides no definite claim scope beyond pure function (what it does, as opposed to what it is). Fresenius argues that under this construction, any structure under the sun that conveys pressure would be covered by Baxter/DEKA's asserted claims. Fresenius contends that this is exactly the sort of overbreadth that is inherent in open-ended functional claims, and which Congress wanted to preclude by enacting § 112, ¶ 6.

Similarly, Fresenius asserts, the limitation "pressure transfer element" is also indefinite, as the '626 patent specification does not define "pressure transfer element" and the phrase has no commonly accepted meaning in the art. Thus, Fresenius contends, the phrase is indefinite as it describes the claimed element only in terms of what it does, not what it is, with the same result as above.

Fresenius argues that the indefiniteness of "pressure conveying element" is further demonstrated in this case by the inability of Baxter/DEKA or their expert to differentiate the claimed "pressure conveying element" from the claimed "pressure transfer element." Fresenius points to Claims 38, 41, and 44 of the '626 patent, each of which recites "[a] system for performing peritoneal dialysis comprising: a pressure conveying element carried within the housing for conveying fluid pressure including a pressure transfer element ...." '626 patent, 43 :59-61; *id.*, 44:23-25; *id.*, 44:56-58.Fresenius contends that the plain language of the claims dictates that there is a difference between "pressure conveying element" and "pressure transfer element."

As noted above, the parties did not request construction of "pressure transfer element." At the hearing on the present motion, the court asked whether Baxter/DEKA was requesting that the court construe "pressure transfer element," and counsel for Baxter/DEKA responded, "No." Nevertheless, counsel indicated that "[t]he analysis is similar to the analysis this Court went through for pressure conveying element," and asserted that "all we're asking Your Honor to do is say, as a matter of law, sitting here at summary judgment, there isn't any argument Fresenius could present to the jury which would meet its clear and convincing burden of [proving that the claims are indefinite]." Reporter's Transcript, September 2, 2009 ("Tr.") at 6-7.

***5** The court is at a loss as to how to resolve this dispute. Notwithstanding the assertion of counsel for Baxter/DEKA that the court should apply an analysis to the construction of "pressure transfer element" that is "similar" to the analysis it applied in construing "pressure conveying element," the fact remains that the parties did not brief the question of the proper construction of "pressure transfer element."

Accordingly, the court has determined to withdraw its prior construction of "pressure conveying element," and to allow further argument by the parties. The parties shall submit supplemental briefing regarding the construction of "pressure transfer element" and the construction of "pressure conveying element" (noting in particular that the claimed "pressure conveying element" is "carried within the housing for conveying fluid pressure including a pressure transfer element ...," '626 patent, 43 :59-61; *id* ., 23-25; *id.*, 44:56-58); and also regarding the indefiniteness argument(s).

Baxter/DEKA's brief (not to exceed 10 pages) shall be filed no later than seven days from the date of this order;

Fresenius' brief (not to exceed 10 pages) shall be filed no later than seven days thereafter; and any reply by Baxter/DEKA (not to exceed 10 pages) shall be filed seven days after Fresenius files its brief. The parties are encouraged to make their arguments as comprehensible as possible.

The court will consider the parties' arguments and issue a ruling on the papers. In addition, as soon as the construction issue and the issue(s) raised by the present motion are resolved, the parties will be given leave to withdraw their pretrial papers and update or replace them as appropriate.

b. asserted claims of the '823, '626, and '422 patents

In its Final Invalidity Contentions, Fresenius alleges that the asserted claims of the '823, '626, and '422 patents disclose only a PD system in which the pumping of the system is accomplished pneumatically; that the patents do not disclose or teach incorporating a mechanical piston that actuates the diaphragm of a diaphragm pump for pumping the dialysis liquid; and that there is no teaching or hint as to how the purely pneumatic pumping system disclosed in the patents could be modified to include a mechanical piston that actuates the diaphragm of a diaphragm pump. For these reasons, Fresenius asserts, the asserted claims are invalid under 35 U.S.C. § 112, ¶ 1, for failure to satisfy the enablement and written description requirements.

In the present motion, Baxter/DEKA contend that the asserted claims of the ' 823, '626, and '422 patents are not invalid for failure to enable or describe actuation by a mechanical piston. They note that all three patents claim the use of fluid pressure, and argue that the enablement and written description requirements apply only to claimed inventions.

In its claims construction brief, Fresenius argued that the term "applying fluid pressure to the diaphragm to operate the pump chamber" in the '823 patent should be construed as "applying alternating positive and negative fluid pressure pulses to the diaphragm such that the diaphragm is flexed in and out and liquid moves through the pump chamber."The parties agreed as to the meaning of each of the words in the term, with the exception of "to operate." Fresenius contended that "to operate" had to be construed as requiring both positive and negative fluid pressure pulses.

***6** In the *Markman* Order, the court found that "applying pressure through a gas or liquid to the diaphragm to operate the pump chamber" in the '823 patent means "applying pressure through a gas or liquid to the diaphragm to operate the pump chamber ."*See Markman* Order at 4-7. The court found nothing in the specification indicating that the patentees intended to give any special meaning to the words "to operate," and that the claim language preceding and following "to operate"-"applying fluid pressure to the diaphragm" and "to either move dialysis solution fluid from the peritoneal cavity or more dialysis fluid into the peritoneal cavity"-clearly explained how the "operation" occurs and what it accomplishes. *Id.* at 7. The court concluded that "[t]he '823 patent claim language is not limited to pneumatics, is not limited to alternating positive and negative fluid pressure pulses, and is not limited to flexing the diaphragm in and out."*Id.* at 6-7.

The '626 patent contains claim language that is nearly identical to the language in the '823 patent, cited above: "conveying fluid pressure ... to the diaphragm to operate the pump chamber and valve ... "Although the court was not asked to construe this term from the '626 patent, Baxter/DEKA argue here that the very similar claim language and nearly identical specifications require the same analysis and construction.

Finally, with regard to the '422 patent, the court construed the means-plus-function term "actuator means for operating the pumping mechanism," finding that the corresponding structure was the "piston element [the structure that forms the pump actuator], port and pump actuator components of the piston head assembly, and equivalents thereof."*Markman* Order at 7-11. Baxter/DEKA contend that there is no suggestion in this construction that the claims require mechanical actuation.

Title 35 § 112 describes what must be contained in the patent specification. Among other things, it must contain "a written description of the invention, and of the manner and process of making and using it ... [such] as to enable any person of ordinary skill in the art to which it pertains ... to make and use the same...."35 U.S.C. § 112 ¶ 1. The Federal Circuit has interpreted this statutory language as mandating two separate and independent requirements: an applicant must both describe the claimed invention adequately and enable its reproduction and use. *See, e.g., Carnegie Mellon University v. Hoffmann-La Roche, Inc.*, 541 F.3d 1115, 1121 (Fed.Cir.2008) (Section 112 ¶ 1 "requires a written description of the invention-a requirement separate and distinct from the enablement requirement"); *see also Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed.Cir.1991).[2]

Section 112's "written description requirement" states that the "specification shall contain a written description

of the invention ."35 U.S.C. § 112, ¶ 1. A patent need not describe every possible embodiment or potential infringing product to meet this requirement. *SuperGuide Corp. v. DirecTV Enters., Inc.,* 358 F.3d 870, 880 (Fed.Cir.2004). However, the specification "must describe an invention in sufficient detail that one skilled in the art can clearly conclude that the inventor invented what is claimed."*Kao Corp. v. Unilever U.S., Inc.,* 441 F.3d 963, 967-68 (Fed.Cir.2006).

*7 Under § 112's "enablement" requirement, a patent's specification must describe the "manner and process of making and using [the invention], in such clear and concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use [the invention]."35 U.S.C. § 112, ¶ 1. The enablement requirement "is often more indulgent than the written description requirement."*Amgen Inc. v. Hoechst Marion Roussel, Inc.,* 314 F.3d 1313, 1334 (Fed.Cir.2003). The specification need not enable every embodiment of a claim. *Abbott Labs. v. Sandoz, Inc.,* 566 F.3d 1282, 1288 (Fed.Cir.2009). Nor need the specification "explicitly teach those in the art to make and use the invention; the requirement is satisfied if, given what they already know, the specification teaches those in the art enough that they can make and use the invention without " 'undue experimentation.' " *Amgen,* 314 F.3d at 3334 (citing *Genentech, Inc. v. Novo Nordisk, A/S,* 108 F.3d 1361, 1365, (Fed.Cir.1997)).

Here, the parties make essentially the same arguments regarding both enablement and written description. Baxter/DEKA contend that the asserted claims of the '823, '626, and '422 patents are not invalid for failure to enable or describe actuation by a mechanical piston. Baxter/DEKA assert that the enabling and written description requirements apply to the *claimed* invention, which this court has already found (at least with regard to the ' 823 patent) to require "applying pressure through a gas or liquid to the diaphragm to operate the pump chamber."*Markman* Order at 4-11.

Baxter/DEKA argue that because the court already determined during claim construction that mechanical actuation is not part of the language of the properly construed, asserted claims of the '823, '626, and '422 patents, Fresenius' invalidity contention runs counter to the court's *Markman* order. They assert that Fresenius is attempting to have the court re-construe the terms in Fresenius' favor. They note that during claim construction, Fresenius asserted that the claims preclude mechanical actuation-e.g., that the claims are limited to a purely pneumatic system-but that the court found (at least as to the asserted claims of the '823 patent) that "the claim language itself is not limited to pneumatics...."*Markman* Order at 6.

Baxter/DEKA assert that the specifications of the '823, '626, and '422 patents meet both the enablement and the written description standard of 35 U.S.C. § 112, ¶ 1, because they enable a person of skill in the art to practice the claims and they describe the claims in sufficient detail as the court has construed them-namely the application of fluid pressure to operate the pump chamber. Baxter/DEKA argue that because the claims require fluid pressure actuation, their alleged silence as to mechanical actuation is not relevant and cannot be a basis for invalidity under § 112, ¶ 1. Thus, Baxter/DEKA assert, summary judgment is warranted on this issue.

***8** In opposition, Fresenius denies that it has ever taken the position that the claims require mechanical actuation. Instead, it asserts, its position is simply that the claims are invalid because Baxter/DEKA have failed to enable or describe the claims in full. Fresenius argues that the fact that a mechanical pump is not required by the claims does not exempt the patentee from enabling and describing the full scope of the claims; and that there is a genuine issue of disputed fact as to whether a person of skill in the art would understand the '823, '626, and '422 patents to enable and describe the full scope of the claims as asserted by Baxter/DEKA.

Fresenius contends that there are, at a minimum, questions of fact as to whether a person skilled in the art, who read the '823 patent specification, would understand the inventors to have invented or enabled a pumping mechanism that combines a mechanical piston to actuate the diaphragm and pneumatics to merely adhere the diaphragm to the piston head. Fresenius asserts that the patents' specification provides absolutely no guidance to a person skilled in the art as to how they should practice the full scope of the claims as asserted by Baxter/DEKA in this case.

Part of the problem here is that the parties are talking at cross-purposes. Baxter/DEKA seek a fairly broad ruling that the asserted claims of the '823, ' 626, and '422 patents meet the enablement and written description requirements, and enable a person of skill in the art to practice those claims.

Fresenius, on the other hand, appears to be arguing that its Liberty Cycler does not infringe the asserted claims of the '823, '626, and '422 patents because the claims are invalid for failing to enable and provide a written description of a method of performing PD in which mechanical actuation

is assisted by pneumatics. Specifically, Fresenius alleges in its Final Invalidity Contentions that the asserted claims of the '626 patents do not enable or describe actuation by a mechanical piston, and that "to the extent that [the asserted claims] are deemed to cover any version of the Liberty Cycler, they are invalid under 25 U.S.C. § 112, ¶ 1, for lack of enablement and failure to meet the written description requirement."

While it asserts, in its opposition to the present motion, that the asserted claims of the '823, '626, and '422 patents "[c]learly ... do not *require* mechanical actuation," Fresenius also argues that Baxter/DEKA "have asserted an extremely broad claim scope in order to accuse the Liberty Cycler."In support, Fresenius cites asserted claim 1 of the '823 patent, which claims a method for performing PD, comprising the steps of "establishing flow communication with the patient's peritoneal cavity through a pumping mechanism ... "and "emulating a selected gravity flow condition by applying fluid pressure to the diaphragm to operate the pump chamber to either move dialysis solution fluid from the peritoneal cavity or move dialysis solution into the peritoneal cavity." '823 patent, 38 :21-31.

***9** Fresenius then argues, as part of a larger discussion of infringement (not at issue here) that Baxter/DEKA's infringement theory is that the Liberty Cycler, which uses a mechanical pump, practices the asserted claims for brief instances only during the drain cycle and during the pistons' instroke.

At the hearing, counsel for Baxter/DEKA stated that "[t]he claims do not require mechanical actuation."Tr. at 22. In response, counsel for Fresenius agreed that "none of these claims require mechanical actuation," adding that "[t]hat is not the basis of our lack of written description and lack of enablement defenses."*Id.* at 23-24;*see also id.* at 24-25.However, to the extent that the court understands Fresenius' arguments, it appears that that is exactly what Fresenius is asserting in its Final Invalidity Contentions and in its opposition to the present motion.

The Federal Circuit has clearly indicated that it is the full scope of the *claimed* invention that must be enabled. *See, e.g ., Sitrick v. Dreamworks, LLC,* 516 F.3d 993, 999 (Fed.Cir.2008). Similarly, the "written description" requirement mandates that the specification "describe the *claimed* invention in 'full, clear, concise, and exact terms.' " *Phillips v. AWH Corp.,* 415 F.3d 1303, 1316 (Fed.Cir.2005) (en banc) (quoting 35 U.S.C. § 112, ¶ 1) (emphasis added); *see also Amgen,* 314 F.3d at 1333 ("under our precedent the patentee need only describe the invention as claimed, and need not describe an unclaimed method of making the claimed product").

It is the ruling of the court that if the asserted claims do not require mechanical actuation-and the parties have agreed that there is no such requirement-the enablement and written description requirements (which apply only to the "claimed" invention) cannot impose on the patent holders the necessity of enabling or describing mechanical actuation. Accordingly, this question cannot be presented to the jury.

However, as the determination of the larger question whether the written description and enablement requirements are satisfied involves fact-based inquiries, *see Martek Biosciences Corp. v. Nutrinova, Inc.,* 579 F.3d 1363, 1378 (Fed.Cir.2009) (enablement); *Carnegie Mellon University v. Hoffmann-La Roche, Inc .,* 541 F.3d 1115, 1122 (Fed.Cir.2008) (written description); and as this issue is not before the court, the court DENIES Baxter/DEKA's motion insofar as they seek a ruling that all asserted claims of the '823, '626, and ' 422 patents meet the enablement and written description requirements.

That is, to the extent that any dispute remains regarding whether the '823, 626, and '422 patents meet the enablement and written description requirements, and that dispute does not involve the question whether the asserted claims require mechanical actuation, such dispute may be given to the jury.

2. Motion as to invalidity contentions for which Fresenius submitted no expert opinion

***10** Baxter/DEKA argue that they are entitled to summary judgment as to certain invalidity contentions for which Fresenius has submitted no expert opinion. Baxter/DEKA assert that in order to overcome the presumption of validity of the patents-in-suit by clear and convincing evidence, Fresenius must provide expert testimony regarding its prior-artbased contentions, as discussed below.

Baxter/DEKA identify three such contentions-(1) that claim 12 of the '547 patent is anticipated or rendered obvious by certain prior art references; (2) that the '823, '626, and '422 patents are anticipated by certain prior art references; and (3) that the asserted claims of the '823 patent are rendered obvious by certain prior art references.

Baxter/DEKA assert, with regard to each of these, that Fresenius' expert(s) failed to find any invalidating references or combinations, with the exception of the

on-sale bar as to (2), and the combination of the Bergstrom Article, the '215 patent, and the '515 patent as to (3). Baxter/DEKA contend that they are entitled to summary judgment on invalidity contentions for which Fresenius cannot meet its burden of proof.

In opposition, Fresenius asserts that it should not be precluded at this stage from arguing theories properly set forth in its invalidity contentions, and that it should be permitted to present evidence at trial to support all of its invalidity contentions. Fresenius notes that the parties have collectively presented expert reports from, and have taken the depositions of, at least thirteen technical expert witnesses, and argues that if even half of these experts testify at trial, the jury will have more than ample guidance in understanding the technology at issue.

The motion is DENIED. This dispute raises an evidence preclusion issue, not a summary judgment issue. Fresenius should be advised, however, that it will likely be precluded from presenting expert testimony regarding prior art if such testimony reflects opinions that were not previously disclosed, and that it will also likely be precluded from presenting prior art to the jury and, based solely on arguments of counsel, asserting that certain claims are anticipated or rendered obvious.

C. Fresenius' Motion

Fresenius argues that the asserted claims of the '823 patent are invalid because of a statutory on-sale bar; that claim 12 of the '547 patent is indefinite and therefore invalid; and that Baxter/DEKA's enhanced damages claim should be limited to a maximum of treble the compensatory damages (if any) from Fresenius' pre-suit conduct.

1. Motion as to invalidity of asserted claims of '823 patent because of statutory on-sale bar

Fresenius contends that the asserted claims of the '823 patent are invalid because the invention of the '823 patent was reduced to practice and was "ready for patenting" as of the Fall of 1989, but DEKA waited well over three years before it filed the application that resulted in the '823 patent. Fresenius also asserts that Baxter filed a pre-market notification in June 1992 advising the Food and Drug Administration that the Personal Cycler System was safe and effective, and that Baxter intended to market the device. However, the actual '823 patent application was not filed until March 3, 1993.

*11 Section 102 of the Patent Act gives inventors a "grace period" of one year following commencement of commercial activity to file a patent application. 35 U.S.C. § 102(b) ("A person shall be entitled to a patent unless the invention was ... on sale in this country, more than one year prior to the date of the application for patent in the United States."). Any attempt to commercialize the patented invention more than one year prior to filing the patent application creates an "on-sale bar" that invalidates a subsequently-issued patent. *Cargill, Inc. v. Canbra Foods, Ltd.*, 476 F.3d 1359, 1368 (Fed.Cir.2007).

The on-sale bar is intended, in part, to prevent inventors from exploiting the commercial value of their inventions while deferring the start of the statutory term of patent protection. *Ferag AG v. Quipp, Inc.*, 45 F.3d 1562, 1566 (Fed.Cir.1995). This rule applies when two conditions are satisfied: the product embodying the asserted claims must be the subject of a commercial offer for sale; and the invention must be ready for patenting. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67 (1998).

The question whether an invention is the subject of a commercial offer is a matter of Federal Circuit law, analyzed under the law of contracts as generally understood. *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1047 (Fed.Cir.2001). To prove that an invention was the subject of a commercial sale, a defendant must demonstrate by clear and convincing evidence that there was a definite sale or offer to sell more than one year prior to the application for the patent, and that the subject matter of the offer to sell fully anticipated the claimed invention or would have rendered the claimed invention obvious by its addition to the prior art. *STX, LLC v. Brine, Inc.*, 211 F.3d 588, 590 (Fed.Cir.2000).

The "ready for patenting" requirement may be satisfied by proof of reduction to practice before the critical date, or by proof that prior to the critical date the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention. *Pfaff*, 525 U.S. at 67-68.Proof of "reduction to practice" generally provides the best evidence that invention is complete, although one can prove that an invention is complete and ready for patenting before it has actually been reduced to practice. *Id.* at 66.

Fresenius asserts that in this case, the invention of the '823 patent was reduced to practice and ready for patenting as of the Fall of 1989, and that between that time and the time the patent application was filed in March 1993, DEKA commercially exploited its invention, garnering millions of dollars in fees from Baxter to

incorporate the invention into a commercial product.

DEKA was founded by Dean Kamen ("Kamen"), one of the named inventors on the ' 823 patent. DEKA and Kamen have designed medical products for Baxter since the early 1980s. Fresenius contends that Baxter approached Kamen in 1987 or 1988 to ask him for help with problems Baxter was experiencing with its PAC-X PD cycler, and that Kamen suggested that instead of fixing the PAC-X, he could design and build a new PD cycler for Baxter.

*12 Citing Baxter/DEKA's responses to interrogatories, Fresenius claims that Kamen and his colleagues at DEKA conceived of the pneumatic pumping technique claimed in the '823 patent by the Spring of 1988, and had reduced it to practice by the Fall of 1989. Fresenius notes that DEKA has admitted the reduction to practice of Claims 1-21, 23-25, 27-29, and 31 of the '823 patent occurred at least as early as Fall 1989, and the reduction to practice of Claims 22, 26, and 30 occurred at least as early as March 3, 1993. Thus, Fresenius contends, of the '823 patent claims asserted by Baxter/DEKA-Claims 1, 4, 5, 10, 13, and 14-all were reduced to practice as early as Fall 1989.

In May 1990, Baxter and DEKA entered into a Global Agreement Concerning New Product Development for Dialysis ("the Global Agreement"), which set forth the terms and conditions under which DEKA would "attempt to develop [n]ew [p]roducts for Baxter," during the period from the effective date of the agreement until January 4, 1993. Fresenius claims that by August 1991, Baxter and DEKA had developed the "Personal Cycler System," and decided to manufacture it and bring it to market.

On August 5, 1991, DEKA and Baxter entered into a Personal Cycler Manufacturing and License Agreement ("PCMLA"). The PCMLA stated that "Deka has developed with Baxter a peritoneal dialysis system known as the 'Personal Cycler System,' " and that "[t]he Personal Cycler System includes ... [listing components]," and that the parties agreed to work together "in the performance of certain pre-manufacturing services and initial manufacturing of" hardware and disposable components of the Personal Cycler System. They anticipated that "commercial introduction of the Personal Cycler System" would occur "on or about August 1, 1992."

Fresenius asserts that there is no doubt that the Personal Cycler described in the PCMLA embodies the asserted claims of the '823 patent, as Baxter/DEKA have consistently taken the position that the Baxter HomeChoice™ cycler embodies all the asserted claims of the '823 patent, and that the "Personal Cycler System" was the name used for the HomeChoice™ product before Baxter selected the trademarked name. Thus, based on the above-quoted statement in the PCMLA-that "Deka has developed with Baxter a peritoneal dialysis system known as the 'Personal Cycler System' "-Fresenius contends that the invention was reduced to practice and ready for patenting as of the date the parties entered into the PCMLA.

Baxter/DEKA argue, however, that the cited statement must be read in the context of the entire agreement, which shows that the development of the Personal Cycler was not yet complete as of the time the parties entered into the PCMLA. They note that Article 1.2 expressly states that the parties did not have a "final product" and that Article 3.2 indicates that product specifications were not complete (let alone "finalized and formally accepted").

*13 Fresenius also contends that the PCMLA includes an offer by DEKA to sell the Personal Cycler System to Baxter, and that it requires DEKA to supply the Personal Cycler System to Baxter in exchange for money. Fresenius claims that the PCMLA is a "requirements contract;" in which DEKA agreed to supply Baxter with its "requirements" of the Personal Cycler product, and so does not state a precise quantity term; and which states that the "purchase price" will be the amount actually charged by DEKA's vendors to manufacture the product, plus "additional compensation" paid to DEKA for its manufacturing services

Thus, Fresenius asserts, the on-sale bar applies because DEKA and Baxter signed the PCMLA more than one year before the patent application date of March 3, 1993. Fresenius argues that had DEKA filed within a year of the date it admits the invention was "ready for patenting," the '823 patent would have expired near the end of 2010. As it is, however, the '823 patent is not set to expire until March of 2013.

In opposition, Baxter/DEKA assert that they did not violate the on-sale bar. They argue that it was only after they had developed the system and filed the application leading to the '823 patent, that they first tested the Personal Cycler on a patient, secured FDA approval, and commercially launched the HomeChoice™ PD system.

According to the chronology provided by Baxter/DEKA, a period of "research and development" extended from January 5, 1990 (the date of the Global Agreement) through August 5, 1991 (the date of the PCMLA), and up to March 3, 1992 ("the critical date"-one year prior to the filing of the patent application). Then starting on March 6,

1992, and running to July 7, 1994 (the commercial "launch date" of the HomeChoice™ system), Baxter and DEKA engaged in "manufacturing and commercialization."

Baxter/DEKA claim that the first agreement that provided for the actual manufacture and sale of the Personal Cyclers to Baxter did not arise until *after* the "critical date." They assert that under the May 1992 Vendor-Produced Finished Goods Purchase Agreement ("Vendor Agreement"), Nova Biomedical agreed to manufacture and sell Personal Cyclers to Baxter upon formal acceptance and approval of a final specification, although various terms were left open for later agreement. They contend that DEKA managed Nova Biomedical's performance under the Vendor Agreement, pursuant to the PCMLA. They assert, however, that nothing in the PCMLA or the Vendor Agreement required DEKA to make, sell, or offer for sale any PD machine to Baxter.

According to Baxter/DEKA, they continued to "refine" and change the Personal Cycler after signing the Vendor Agreement. On March 3, 1993, while these changes were still ongoing, DEKA filed the application that led to the '823 patent-which Baxter/DEKA assert was three days before the earliest possible trigger of the on-sale bar. They contend that it was only after this that they first tested the Personal Cycler on a patient, finally performing peritoneal dialysis.

***14** Baxter/DEKA contend that in May 1993, Baxter began extensive patient evaluations in a Test Market Evaluation ("TME"), designed to test the HomeChoice™ system in the hands of users in the actual environment in which the product would be used. During and after the TME, Baxter/DEKA worked on a "significant maturation of the product" and on improvement in the reliability and performance of the alarms.

In November 1993, Nova Biomedical planned to perform a third of three preproduction runs, incorporating further design changes. Baxter/DEKA assert that it was only after this third pre-production build that the Personal Cycler Systems were to be considered "Normal Production machines." Baxter received FDA approval for the HomeChoice™ PD device on March 4, 1994, and commercially launched the HomeChoice™ in July 1994-nearly three years after the PCMLA's effective date.

Having considered the parties' arguments, the court finds that the motion must be DENIED. Fresenius has not established that the asserted claims of the ' 823 patent are invalid because of a statutory on-sale bar. Fresenius' position is that the PCMLA obligates DEKA to supply the Personal Cycler System to Baxter, and obligates Baxter to pay for machines and disposables supplied by DEKA; and that Article 8 of the PCMLA shows that DEKA-the patent owner-undertook a legal obligation to sell the Personal Cycler System to Baxter.

The court has read the PCMLA carefully, however, and does not agree with the interpretation urged by Fresenius. The PCMLA is a contract for services and a patent license, rather than an enforceable commercial "supply" agreement or a "requirements" contract, as it requires DEKA to provide manufacturing administration services and technical assistance to an eventual third-party manufacturer, and does not provide for the transfer of title in any Personal Cycler from DEKA to Baxter. Neither the contemplation of future commercialization of a product nor the granting of a license to an invention in itself triggers the on-sale bar. *See In re Kollar,* 286 F.3d 1326, 1330-31 (Fed.Cir.2002)).

The face of the PCMLA reflects that the intent of the parties was for Baxter to have the components manufactured by the vendors, and then assembled for Baxter, which would then own the finished product. PCMLA, Arts. 4, 5, 6. DEKA's role would be limited to providing certain "pre-manufacturing services," and to managing the third-party manufacturers who contracted to sell the components to Baxter at some future time. *Id.,* Arts. 4, 5, 8.

DEKA agreed to "advise and consult with Baxter," to "negotiate Vendor contracts," to "schedule and coordinate the work of all Vendors;" to "keep Baxter and Vendors informed as to Baxter's production requirements and delivery schedules," and to oversee the Vendors who would actually manufacture and sell the Personal Cycler; and that Baxter would "remit payment directly to Vendor(s), with written confirmation of payment to Deka."*Id.,* Art. 5.

***15** There is no support in the PCMLA for Fresenius' suggestion that DEKA was authorized to add anything on top of those vendor invoices for itself. Article 5.3 of the PCMLA, "Vendor Payments," provides that "[i]n the event Deka has made a payment on Baxter's account, Deka will be reimbursed by Baxter in accordance with the Application for Payment."Thus, DEKA was entitled to recover its direct costs from Baxter, and there is no indication that the invoices represent anything other than requests for compensation for direct costs or for manufacturing services.

Pursuant to the PCMLA, DEKA was compensated for supervising the Vendors, for facilitating the provision of

hardware and disposables to Baxter by the vendors, and for implementing improvements in manufacturing and quality assurance, among other things, *id.*, Art. 10.2, as well as for its research and development services, per the Global Agreement, but DEKA did not "own" a product that it was then selling to Baxter.

Because Baxter did not seek summary judgment as to this affirmative defense, the court cannot rule for Baxter on the issue of the on-sale bar. However, Fresenius has not presented evidence sufficient to raise a triable issue as to whether the Personal Cycler was "on sale" more than a year before the patent application was filed. In order to present this question to the jury, Fresenius will need evidence other than the evidence it relied on in this motion.

2. Motion as to invalidity of Claim 12 of the '547 patent

Fresenius argues that Claim 12 of the '547 patent is indefinite and therefore invalid. Claim 12 of the '547 patent is directed to a pump connected to a vacuum source, and claims

> A pump connected to at least one vacuum source for use in a system for providing dialysis treatment, the pump comprising:
>
> a first chamber wall;
>
> a second chamber wall, the second chamber wall defining an aperture;
>
> **first and second fluid receiving membranes disposed between the first and second chamber walls, the at least one vacuum source operable to apply a vacuum between *the membrane* and the walls;**
>
> a piston, at least a portion of which moves through the aperture, the piston including a piston head having an external shape substantially similar to a mating internal shape of the first chamber wall, the piston in operation contacting **one of the membranes;**
>
> a dialysis fluid opening enabling dialysis fluid to be pulled in **between the first and second membranes** upon movement of the piston.

'547 patent, 58 :27-45 (emphasis added).

Fresenius asserts that the claim is indefinite because the claimed invention requires two membranes ("first and second fluid receiving membranes"), and the language in the claim fails to identify which of the two membranes the claim is referencing in the phrase "apply a vacuum between the membrane and the walls."Fresenius cites to the Manual of Patent Examining Procedure ("MPEP") for the following proposition: "A claim is indefinite when it contains words or phrases whose meaning is unclear.... Similarly, if two different levers are recited earlier in the claim, the recitation of 'said lever' in the same or subsequent claim would be unclear where it is uncertain which of the two levers was intended."MPEP § 2173.05(e).

*16 Fresenius contends that the specification of the '547 patent fails to resolve this ambiguity, and in fact confirms that the claim is indefinite. Fresenius asserts that the "first and second fluid receiving membranes" recited in Claim 12 are the "upper" and "lower" membranes 162 and 164 illustrated in Fig. 17A. As noted above, Claim 12 requires that the vacuum be applied between "the membrane" and the walls. Fresenius argues, however, that specification does not clarify which of the two membranes-the upper membrane or the lower membrane-is being referenced in the phrase "the ... vacuum source operable to apply a vacuum between the membrane and the walls."

Fresenius asserts further that the specification shows that vacuum is applied to these two different membranes through two different pathways-the vacuum source exerts a vacuum on the upper membrane through aperture or port 222, and on the lower membrane through an aperture 221 defined by housing 223, and through the port or aperture 220. *See* '547 patent, 33 :20-26. Thus, Fresenius argues, a person of skill in the art would be unable to determine which "membrane" the vacuum is applied to, and therefore would be unable to ascertain the scope of the claim. For this reason, Fresenius contends, the claim is indefinite.

Fresenius adds that the other references to "membranes" do not resolve the issue. Claim 12 refers to "the piston" contacting "one of" the two membranes, *id.*, 58:40-41; and also recites that upon movement of the piston, dialysis fluid is "pulled in between the first and second membranes,"*id.*, 58:42-43 However, Fresenius argues, these elements do not help clarify the issue.

In opposition, Baxter/DEKA make three main arguments-that the patent examiner allowed Claim 12 with the addition of the limitation Fresenius now attacks; that the meaning of the claim term "the membrane" is clear when read in light of the entirety of Claim 12 and the specification; and that persons of ordinary skill in the art would understand that "the membrane" is the second fluid-receiving membrane.

First, Baxter/DEKA assert that the patent examiner initially rejected pending Claim 12 under § 112, and that Baxter then added this exact limitation to Claim 12. The patent examiner subsequently allowed Claim 12 with the addition of the limitation Fresenius now attacks, and issued the Notice of Allowance.

Baxter/DEKA argue that because the addition of the limitation "the at least one vacuum source operable to apply a vacuum between *the membrane* and the walls" convinced the patent examiner that Claim 12 met § 112's requirements and was allowable, the court should presume that the examiner performed his duty and allowed a valid claim. Citing *Al-Site Corp. v. VSI Int'l, Inc.*, 174 F.3d 1308 (Fed.Cir.1999), they contend that "[t]he presumption of validity under 35 U.S.C. § 282 carries with it a presumption that the Examiner did his duty and knew what claims he was allowing."*Id.* at 1323.

*17 Second, Baxter/DEKA argue that the meaning of the claim term "the membrane" is clear when read in light of the entirety of Claim 12 and the specification. They note that in citing the quoted excerpt from MPEP § 2173.05(e), Fresenius has omitted a key portion of the text. The full statement is as follows (underlined portion was omitted by Fresenius).

> A claim is indefinite when it contains words or phrases whose meaning is unclear ... Similarly, if two different levers are recited earlier in the claim, the recitation of "said lever" in the same or subsequent claim would be unclear where it is uncertain which of the two levers was intended....*Obviously, however, the failure to provide explicit antecedent basis for terms does not always render a claim indefinite. If the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite.*

Claim 12 states that "the piston in operation contact[s] one of the membranes," and Baxter/DEKA assert that the only one of the two membranes that is capable of contacting the piston is the one located closest to the piston head and the second chamber wall. They contend that the specification provides further guidance as it discloses that a vacuum is used to couple the second fluid receiving membrane to the piston head. *See* '547 patent, 5 :7-9; *id.*, 33:27-29.

Baxter/DEKA contend that the claim and the specification make clear that the piston is moving through the aperture in the second chamber wall, and that the second fluid receiving membrane is closest to the piston head. Thus, they argue, it is the second fluid receiving membrane that is referred to in Claim 12 as "the membrane."

The court finds that the motion must be DENIED. To show a claim indefinite, the accused infringer must "show by clear and convincing evidence that a skilled artisan could not discern the boundaries of the claim based on the claim language, the specification, and the prosecution history, as well as her knowledge of the relevant art area."*Halliburton*, 514 F.3d at 1244.Here, Fresenius has not established by clear and convincing evidence that a skilled artisan would not understand that when the claim requires a vacuum applied between "the membrane" and the walls, the membrane referenced is the second fluid receiving membrane.

Claim 12 recites "first and second fluid receiving membranes disposed between first and second chamber walls," with the second chamber wall "defin[ing] an aperture." In addition, a piston, "at least a portion of which moves through the aperture, in operation contact[s] one of the membranes."Only one piston is claimed, and that piston moves through the only claimed aperture (which is located in the second chamber wall). Since both fluid receiving membranes are disposed between the two chamber walls, one of the membranes must be closer to the first chamber wall, while the other membrane must be closer to the second chamber wall.

*18 When the piston moves through the aperture, the membrane that it contacts must be the second fluid receiving membrane-the one that is closest to the second chamber wall-as that is the chamber wall that contains the aperture through which the piston moves. When the piston moves, dialysis fluid is pulled in between the first and second membranes. Thus, the "vacuum source operable to apply a vacuum between the membrane and the walls" refers to applying a vacuum between the second membrane, or the membrane closest to the piston head, and the walls.

Again, as with the issue of the on-sale bar, Baxter did not seek summary judgment as to this affirmative defense, and the court therefore cannot rule for Baxter on the question whether Claim 12 is valid. However, Fresenius has not presented evidence sufficient to raise a triable issue as to this defense. In order to present this question to the jury, Fresenius will need evidence other than the evidence it relied on in this motion.

3. Motion re limitation of damages

Fresenius argues that Baxter/DEKA's enhanced damages claim should be limited to a maximum of treble the compensatory damages (if any) from Fresenius' pre-suit conduct. Fresenius claims that the remedy that was available to Baxter/DEKA for any alleged willful, post-litigation conduct collapsed when Baxter/DEKA failed to move for a preliminary injunction at the inception of the case in March 2007, or when the allegedly infringing product was launched over a year and a half later, or at any time during the subsequent course of this litigation.

In opposition, Baxter/DEKA argue that Fresenius' motion to limit enhanced damages is both premature and legally unfounded. They contend that whether and to what extent they are entitled to enhanced damages is for the court to decide after the jury has heard all the evidence at trial and has decided that Fresenius' infringement was willful. In addition, Baxter/DEKA argue, to the extent that Fresenius is attempting to lay the groundwork for a motion in limine to limit the scope of admissible evidence to only pre-filing conduct, such limitation has no legal basis.

The motion is GRANTED. An award of enhanced damages in a patent infringement suit requires a showing of willful infringement. *In re Seagate Tech., LLC,* 497 F.3d 1360, 1368-74 (Fed.Cir.2007); *see also Jurgens v. CBK, Ltd.,* 80 F.3d 1566, 1570 (Fed.Cir.1996) (bad faith infringement, which is a type of willful infringement, is required for enhanced damages).

In *Seagate,* the Federal Circuit stated that "in ordinary circumstances, willfulness will depend on an infringer's prelitigation conduct."*Id.,* 497 F.3d at 1374."By contrast, when an accused infringer's post-filing conduct is reckless, a patentee can move for a preliminary injunction, which generally provides an adequate remedy for combating post-filing willful infringement."*Id.* Moreover, the court observed, a patentee who does not attempt to stop an accused infringer's activities by seeking a preliminary injunction "should not be allowed to accrue enhanced damages based solely on the infringer's post-filing conduct ."*Id.*

***19** The court is persuaded by the reasoning in *Seagate.*As Baxter/DEKA did not seek injunctive relief to stop the alleged infringement, the court finds that they should not be entitled to seek enhanced damages for any post-filing infringement.

CONCLUSION

In accordance with the foregoing, plaintiffs' motion is GRANTED in part and DENIED in part, and the ruling is DEFERRED in part. Defendants' motion is GRANTED in part and DENIED in part.

Baxter/DEKA's motion to strike portions of Fresenius' reply in support of its motion for summary judgment, or in the alternative, to file a sur-reply, is DENIED, as Fresenius states in its response that it is not relying on the exhibits at issue as a basis for its motion.

IT IS SO ORDERED.

Footnotes

1 The court was not asked to construe "pressure transfer element ."

2 The court notes, however, that the Federal Circuit is presently considering an appeal raising the question whether § 112, ¶ 1 contains a written description requirement separate from an enablement requirement; and if so, what the scope and purpose of the requirement is. *See Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.,* 332 Fed. Appx. 636, 2009 WL 2573004 (Fed.Cir., Aug. 21, 2009) (order vacating April 3, 2009, 560 F.3d 1366, opinion, reinstating appeal, and granting petition for rehearing en banc).

End of Document

TAB E

2005 WL 2810716
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

ACEMCO, INC, d/b/a Acemco Automotive,
Plaintiff-Appellee/Cross-Appellant,
v.
OLYMPIC STEEL LAFAYETTE, INC,
Defendant-Appellant/Cross-Appellee.

No. 256638. | Oct. 27, 2005.

Before: BANDSTRA, P.J., and NEFF and DONOFRIO, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 Defendant, Olympic Steel Lafayette, Inc. (Olympic), appeals as of right from a judgment in favor of plaintiff, Acemco, Inc. (Acemco) in this contract action. On appeal, Olympic argues that because the Supply Agreement between the parties violates the statute of frauds, is too indefinite, and lacks consideration, it is unenforceable and therefore the trial court erred when it granted Acemco's motion for summary disposition and denied Olympic's motion for summary disposition. On cross-appeal, Acemco argues that the trial court erred when it did not allow it to recover attorneys fees and costs under the Supply Agreement, the trial court erred when it granted Olympic's motion for summary disposition specifically finding that Acemco was not entitled to the agreement's pricing from November 2001 through December 2001, and finally that if this Court finds that the jury verdict in the matter must be reversed, that the trial court erred when it found the Supply Agreement was not a requirements contract.

Because the Supply Agreement lacks a quantity term and violates the statute of frauds, is too indefinite to be enforced, and mutual consideration is absent, the Supply Agreement is wholly unenforceable both for the term of the agreement and retroactively. Further, the trial court properly found that the Supply Agreement was not a requirements contract and properly dismissed Acemco's claim for attorney fees and costs of litigation. We affirm in part, reverse in part, and remand.

Acemco is an automotive supplier that manufactures metal stampings for use in various cars and light trucks. Olympic is a steel service center that provides improved steel coils for use in manufacturing to various customers in the automotive industry including plaintiff. On December 6, 2001, Acemco and Olympic executed a written agreement. The written document is entitled "Supply Agreement"[1] and includes two exhibits, A and B. The parties agreed to the following obligation:

> *Purchase of Products.* During the term of this Agreement, the Seller agrees to sell to the Buyer such quantities of the Products as the Buyer may specify in its purchase orders, which the buyer may deliver at its discretion.

According to the document, exhibit A set forth the specifications of the steel products distributed and sold by Olympic. Exhibit A is a spreadsheet listing twenty-four items, several columns of product specifications, and one column entitled "Price delv'd." Centered on two lines on the top of the document are the words "Acemco Blanket 2001" and it is dated November 13, 2001. Elsewhere on the document are the words "2002 Pricing."

The only time the Supply Agreement references exhibit B is in a term concerning "pricing." The term states as follows:

> *Pricing.* The pricing of the Products during the term of this Agreement shall be as provided in Exhibit B attached hereto.

Attached to the Supply Agreement representing exhibit B is a purchase order printed on an Acemco order form. The purchase order lists Olympic as the "VENDOR" and Acemco as the "SHIP TO." The "quantity" column on the purchase order is listed as "1.000 EA." There are two product prices appearing on the purchase order and are listed as "HRPO Steel: $14.95" and "HSLA Steel: $15.85." Exhibit B does not incorporate or include the word "blanket" or the phrase "blanket order". In fact, other than in the specifications exhibit, the word "blanket" or phrase "blanket order" is conspicuously absent.

*2 Following execution of the contract, Acemco began purchasing steel from Olympic pursuant to the prices in the Supply Agreement. Within a few months after the

execution of the Supply Agreement, the institution of steel tariffs caused the market price levels on raw steel to increase dramatically. Despite instituting a corporate goal to move to a leaner raw steel inventory carrying system in 2001, reducing the year 2000 inventory level of three to four weeks to five to ten days, and after the increase in steel prices, Acemco established a plan to drastically increase its in-house inventory levels in order to build a "safety stock of raw material." Acemco's increasing inventory on-hand goals resulted in Acemco rapidly increasing its steel orders from Olympic through spring and summer 2002.

After receiving Acemco's orders, Olympic warned Acemco that it would not be able to continue to supply it with the increasing quantities of steel, and also requested that Acemco pay a price premium on the prices set forth in the Supply Agreement on its orders as a result of prevailing market prices. Acemco responded that it would not pay an increased price and repeatedly requested assurances from Olympic that it would be able to fulfill the amounts of steel ordered in its purchase orders or Acemco would be forced to obtain "cover." Olympic attempted to procure the steel necessary to fulfill Acemco's orders and continued to make steel deliveries under the Supply Agreement throughout spring and summer 2002 but was late with some deliveries and missed others. Ultimately, because Olympic did not provide the requested assurances, Acemco declared Olympic in breach of the Supply Agreement in September 2002. Acemco informed Olympic that it would no longer accept any deliveries from Olympic. Acemco admitted that one of the reasons it told Olympic not to deliver further steel was because Acemco "had insufficient floor space for the deliveries scheduled both from Olympic and from [its] alternate suppliers."Acemco admitted that at that point its plants were "virtually filled up with steel."

Acemco filed a complaint against Olympic alleging breach of the Supply Agreement and requested the court to award Acemco cover damages. Olympic answered and filed a counter-claim seeking damages against Acemco alleging that the Supply Agreement was not enforceable, and alternatively, to the extent it was enforceable, that it was Acemco who was in breach of the Supply Agreement. After discovery, the parties filed cross-motions for summary disposition, and the trial court found the Supply Agreement enforceable. As such, the trial court granted partial summary disposition in favor of Acemco on its breach of contract claim against Olympic for failure to timely deliver steel orders and failure to provide assurances, and found that Acemco was entitled to cancel the Supply Agreement and seek cover.

At the same time, and on Olympic's motion for summary disposition regarding unenforceability, the trial court found that the Summary Agreement was neither indefinite in its terms nor lacking consideration. In favor of Olympic, the trial court granted partial summary disposition holding that nothing in the record supported Acemco's assertions that the Supply Agreement was a "requirements contract."

*3 Thereafter, the matter proceeded to a jury trial where the core issue for the jury was to determine the actual quantity of "Acemco's 2002 forecasted volume." The court instructed the jury that the Supply Agreement was an enforceable contract; the contract was broken as of August 28, 2002; and that the quantity term was "Acemco's 2002 forecasted volume, give or take 15%."The jury returned a verdict awarding Acemco $772,135 in "cover" damages for breach of contract and Olympic $821,382 in damages for breach of contract on its remaining counterclaims. The trial court entered an order of judgment reflecting the jury verdict ordering Acemco to pay Olympic a total judgment of $121,777. The court did not award costs to either party. Olympic timely appealed the final order assigning legal errors at the summary disposition phase of the action. Acemco answered and cross-appealed.[2]

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v. Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone. *Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999). All factual allegations are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Id.* The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify recovery. *Id.*

A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v. Detroit Bd of Ed,* 470 Mich. 274, 278; 681 NW2d 342 (2004). A court must consider the entire record in the light most favorable to the nonmoving party. *Id.* The trial court may grant summary disposition under MCR 2.116(C)(10) if it determines there is no genuine issue of material fact and judgment is warranted as a matter of law. *Id.* A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record presents an issue on which reasonable minds could differ. *West v. Gen Motors Corp,* 469 Mich. 177, 183; 665 NW2d 468 (2003).

On direct appeal, Olympic first argues that the trial court erred when it denied its motion for summary disposition because the Supply Agreement is unenforceable since it lacks a quantity term and violates the statute of frauds. Acemco counters asserting that because the Supply Agreement does contain a quantity term and because Olympic admitted the parties entered into the Supply Agreement, the statute of frauds does not preclude enforcement of the contract.

The contract between the parties was one for the sale of goods and so it falls under the Uniform Commercial Code. Thus, the issues in this case are governed by the UCC as adopted in Michigan. MCL 440 .1101*et seq.* Under MCL 440.2106(1), a "contract for sale" includes both a present or future sale of goods. The UCC statute of frauds provision applies to the sale of goods and the Supply Agreement in this case concerned the sale of goods, i.e., steel. Therefore, MCL 440.2201(1) applies to this case. The statute requires that the quantity term of a contract for the sale of goods be in writing before the contract is enforceable. *Lorenz Supply Co v. American Standard, Inc,* 419 Mich. 610, 614; 358 NW2d 845 (1984). Specifically, MCL 440.2201(1) requires: (1) a "writing sufficient to indicate that a contract for sale has been made between the parties" and (2) that the writing be "signed by the party against whom enforcement is sought."MCL 440.2201(1). While other terms of the contract may be proven by parol evidence, the quantity may not. *Lorenz Supply Co, supra* at 614; *In re Frost Estate,* 130 Mich.App 556, 559; 344 NW2d 331 (1983). This Court in *In re Frost Estate, supra,* articulated the rule as follows:

> *4 "When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity,"
>
> but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term. [*Id.* quoting *Alaska Independent Fisherman's Marketing Ass'n v New England Fish Co,* 15 Wash App 154, 159-160; 548 P 2d 348 (1976), quoting *Hankins v American Pacific Sales Corp,* 7 Wash App 316; 499 P 2d 214 (1972).]

The Supply Agreement separate from its exhibits contains twenty-nine enumerated terms set out separately, none of which is entitled "quantity." Quantity is referred to in only one place in the Supply Agreement, in paragraph 1, where it states:

> 1. *Purchase of Products.*During the term of this Agreement, the Seller agrees to sell to the Buyer such quantities of the Products as the Buyer may specify in its purchase orders, which the buyer may deliver at its discretion.

Reasonable minds could not construe the above language as containing a quantity term because the language specifies no quantity whatsoever. The language instead grants complete discretion to the buyer to deliver purchase orders containing any amount or no amount at its discretion without any other limiting feature. The grant of complete discretion results in a countless number of possible quantities from zero to infinity. "Any" quantity is in fact no quantity at all.

Acemco argues that Exhibit A includes the term "blanket" on the attachment and that the use of that word in conjunction with the description of products on the attachment is sufficient to satisfy the quantity term requirement. Exhibit A is referred to in the Supply Agreement only in the preamble section of the document, and it states as follows:

> The Seller is engaged in the distribution and sale of certain steel products, the specifications for which are set forth in Exhibit A attached hereto (the "Products").

In *Great Northern Packaging Inc v. General Tire and Rubber Co,* 154 Mich.App 777, 787; 399 NW2d 408 (1986) this Court found that the term "blanket order" expresses a quantity, albeit an imprecise one allowing for the introduction of parol evidence to determine the quantity. In that case, the words "Blanket Order" appeared on an actual purchase order. The purchase order was a change order that had altered the initial quantity represented on the purchase order from the words "fifty units" to the words "Blanket Order." *Id.* at 780.Here, the word is simply "blanket" and not "blanket order," the word appears on the top of a specifications sheet and not on a purchase order actually representing a quantity. Reasonable minds could not differ that the word "blanket" itself, its placement on the header of a specifications sheet, or the use of the word "blanket" in conjunction with the description of products does not implicate the concept of quantity, let alone provide a quantity sufficient to satisfy the statue of frauds.

*5 Acemco also argues that Exhibit B is clearly a blanket purchase order and uses terminology based on blanket order principles and thus the language in the Supply

Agreement itself satisfies the statute of frauds because of the use of the phrase "in its purchase orders" in paragraph one of the agreement. Exhibit B is referenced only once and that is in paragraph three regarding "pricing" in the Supply Agreement. The term states as follows:

> 3. *Pricing.*The pricing of the Products during the term of this Agreement shall be as provided in Exhibit B attached hereto.

As Exhibit A was used to illustrate product specifications, Exhibit B was clearly used to set the price of the steel. Although printed on a purchase order form, this document was not an order. Exhibit B was only referred to in paragraph three of the contract, the pricing paragraph, and the quantity of 1.000 EA shows that one unit of HRPO Steel was priced at $14.95, and one unit of HSLA Steel was priced at $15.85. Unlike *Great Northern Packaging Inc, supra,* this purchase order was not an actual order because it was not used to make an order. Instead, the document merely set out a pricing schedule and never referenced contract quantity. Reasonable minds could not differ regarding whether Exhibit B was a purchase order or pricing schedule. Exhibit B alone or read in concert with the rest of the Supply Agreement does not provide a quantity term.

For all of these reasons, reasonable minds could not construe the language in the Supply Agreement as containing a quantity term. The trial court erred when it found that the Supply Agreement contained "an imprecise or erroneous quantity provision."The trial court erred when it allowed the introduction of any parol evidence to "supply the missing quantity term." *In re Frost Estate, supra* at 559.

Acemco next argues that even if the Supply Agreement does not contain a quantity, Olympic's admissions satisfy the statute of frauds exception. The trial court found that Olympic cannot rely on the statute of frauds defense because Olympic admitted that the Supply Agreement was an enforceable contract in its pleadings, and because the "uncontroverted documentary record further establishes that corporate officers of Olympic admitted in their depositions that the quantity of steel which they were obligated to sell to Acemco under the contract was the Acemco 2002 forecasted volume, give or take fifteen percent."

Our legislature has provided a judicial admission exception to the requirement that a contract for the sale of goods be in writing. MCL 440.2201(3)(b).[3] It provides in pertinent part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> *6 (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.... [MCL 440.2201(3)(b).]

Acemco asserts that in Olympic's pleadings, Olympic repeatedly refers to the Supply Agreement, and in its counterclaim relies on the Supply Agreement in support of its own breach of contract claims against Acemco and that these references constitute admissions for purposes of MCL 440.2201(3)(b). Acemco also points to deposition testimony of Olympic's former sales manager, Todd Watts, its chief financial officer, Richard Marabito, and inside sales manager, Sandra Innes, indicating that the parties had a contract for purposes of MCL 440.2201(3)(b).

First, our review of Olympic's pleadings reveals that Olympic does reference the Supply Agreement. However, the references are for purposes of challenging the sufficiency of the agreement. Acknowledging the existence of a writing encompassing an agreement between the parties does not constitute an admission that the Supply Agreement is a valid and enforceable contract containing all required terms. Also, Olympic did plead the affirmative defenses of the statute of frauds and lack of mutuality from its first pleadings illustrating that Olympic did not concede the Supply Agreement was a valid and enforceable contract despite referencing the agreement in its pleadings.

Acemco also points to deposition testimony of Olympic's former sales manager, Todd Watts, asserting that his testimony not only constitutes an admission of contract for purposes of MCL 440.2201(3)(b), but also a "quantity

of goods admitted" pursuant to MCL 440.2201(3)(b). However, the deposition established that Watts was no longer associated with Olympic in any capacity on the date of his deposition, April 16, 2003. In fact, Watts testified that he left Olympic's employ on his own volition on September 3, 2002. Because Watts was no longer employed by Olympic, any statements he made during the deposition cannot qualify as admissions under the judicial admission exception to the requirement that a contract for the sale of goods be in writing. MCL 440.2201(3)(b).[4]

Next, Acemco points to deposition testimony of Olympic's chief financial officer, Richard Marabito. A review of Marabito's deposition testimony reveals that he was employed as an officer of Olympic on the date of the deposition. Moreover, it is clear that Marabito testified that the parties had a contract. This admission does fulfill the first prong of MCL 440.2201(3)(b), that a contract for sale was made by the parties. But it does not fulfill the second prong of MCL 440.2201(3)(b)-enforceability. MCL 440.2201(3)(b) states that even if a contract is admitted, "the contract is not enforceable under this provision beyond the quantity of goods admitted."Acemco does not highlight in its brief on appeal, and we have not found in Marabito's deposition, any "quantity of good admitted" or even a reference to quantity under the Supply Agreement. Therefore, Marabito's deposition testimony, although an admission that the parties made a contract for the sale of goods, does not make the contract enforceable because he has not provided an admitted quantity to fulfill the second prong of MCL 440.2201(3)(b).

*7 Finally, Acemco relies on the deposition testimony of Sandra Innes, Olympic's inside sales manager, stating that her testimony also satisfies the admission exception to the statute of frauds, MCL 440.2201(3)(b). In its brief on appeal, Acemco states specifically, "Innes testified that Olympic was obligated to provide *a customer like Acemco* with up to 15% more steel than its annualized forecast and also acknowledged that Olympic and Acemco did have a business account relationship."[Emphasis added.] Acemco never asserts that Innes admitted there was an enforceable contract between the parties, and further, never asserts that Innes was aware of a quantity term present in the agreement between Acemco and Olympic. Our reading of Innes' testimony reveals that she never testified specifically about the Supply Agreement and further never provided a quantity term for the Supply Agreement at issue. Innes' testimony was much more generalized and concerned a methodology used to arrive at quotes from her experience in the industry, and was not an admission that the parties made a contract for the sale of goods and does not make the contract enforceable pursuant to the exception found in MCL 440.2201(3)(b) since she has not provided an admitted quantity.

Because there is no discernable quantity included in the four corners of the Summary Agreement, and because Acemco offered no admissible testimony providing both an admission of a contract for the sale of goods and an admitted quantity, the trial court erred when it denied Olympic's motion for summary disposition. Since Olympic has established that the Supply Agreement is not enforceable for lack of a quantity term and that the trial court erred when it denied Olympic's motion for summary disposition, we decline to reach Olympic's alternate arguments supporting reversal.

On cross-appeal, Acemco argues the trial court erred when it granted Olympic summary disposition on Acemco's claims for attorney fees and costs. We review a trial court's decision concerning attorney fees and costs for an abuse of discretion. *Kernen v. Homestead Dev Co,* 252 Mich.App 689, 691; 653 NW2d 634 (2002); *Schoensee v. Bennett,* 228 Mich.App 305, 314; 577 NW2d 915 (1998). A trial court's decision constitutes an abuse of discretion when the result is "so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion."*Id.* at 314-315.

In general, a contractual provision requiring the breaching party to pay the other side's attorney fees is judicially enforceable. *Zeeland Farm Services, Inc v. JBL Enterprises, Inc,* 219 Mich.App 190, 195; 555 NW2d 733 (1996). But recovery is limited to reasonable attorney fees. *Id.* at 195-196; *In re Howarth Estate,* 108 Mich.App 8, 12; 310 NW2d 255 (1981). However, because the Supply Agreement is not enforceable since the quantity term is missing, Acemco cannot attempt to enforce the indemnity section of the Supply Agreement regarding claims for attorney fees and costs. Likewise, Acemco's attempts to enforce an unenforceable agreement retroactively from November 1, 2001 through December 5, 2001 must also fail.

*8 Finally, Acemco argues on cross-appeal that if this Court reverses the jury verdict and finds that MCL 440.2201 applies, and that the Supply Agreement is not a fixed quantity agreement, then the Supply Agreement is still enforceable as a requirements contact, contrary to the trial court's finding otherwise. Our Supreme Court has stated that in order for a requirements contract to be enforceable under MCL 440.2201(1), specific language describing the "requirements or output term of a contract" must be included in the written agreement. *Lorenz Supply*

Co, supra at 615.The trial court found, and we agree, that there is nothing in the Supply Agreement suggesting a requirements contract. Further, a requirements contract has been described as an agreement "in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller."*Propane Industrial, Inc v. General Motors Corp,* 429 F Supp 214, 218 (WD Mo, 1977). Again, the trial court found, and we agree, that nothing in the written agreement binds Acemco to purchase its steel exclusively from Olympic. This is further support for the conclusion that the Supply Agreement is not a requirements contract.

Affirmed in part, reversed in part, and remanded. We remand to the trial court for entry of summary disposition in favor of Olympic. And we direct the trial court to vacate the post-trial judgment and enter judgment in accordance with the jury verdict in favor of Olympic on its counterclaims. We do not retain jurisdiction.

Footnotes

1 The first paragraph of the Supply Agreement errantly lists Acemco as the "Seller" and Olympic as the "Buyer." The trial court found that this error was nothing more than a "typographical error" and had no other effect on the Supply Agreement because there was no other conduct or admission suggesting a reversal of roles. The parties do not raise this issue on appeal and we do not address it.

2 Neither party has appealed any aspect of the jury trial.

3 MCL 440.2201 was rewritten and amended by PA 2002, No. 15 effective February 21, 2002. The amended version of the statute increases the amount in subsection (1) to $1,000.00 or more, but does not otherwise materially change the statute. For purposes of this case, since the statute was amended after the Summary Agreement was executed on December 6, 2001, we reference the previous version of the statute.

4 See also MRE 801(d)(2)(D) for further support.

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TAB F

2004 WL 1532280

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

BENEDICT MANUFACTURING CO.,
Plaintiff-Appellant,
v.
AEROQUIP CORP., Defendant-Appellee.

No. 242563. | July 8, 2004.

Before: TALBOT, P.J., and OWENS and FORT HOOD, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. Plaintiff claimed that defendant breached as many as 140 contracts for the sale of goods. The trial court granted summary disposition on the basis of the Uniform Commercial Code's (UCC) provisions concerning the statute of frauds. MCR 2.116(C)(7). We conclude that the trial court erred in determining that plaintiff was bound by the quantity expressed in the purchase orders and that there are genuine issues of material fact that must be submitted to the trier of fact. We therefore reverse.

I. Factual background

Plaintiff supplied defendant with various marine parts for many years. These parts could be broken down into two broad categories: "rings and bands" and "parts other than rings and bands."In 1990, defendant switched from ordering "spot buys," or purchases for a specific quantity of parts that are shipped on a specific delivery date, to "contract buys," purchases for a specific quantity of parts that are shipped over the term of the contract.

Defendant's buyer from 1990 to May 31, 1994, Lois Jones, attested that she had a "verbal understanding" with plaintiff that, for "parts other than rings and bands," she would order a specific quantity of parts that was approximately 80 percent of the parts that defendant would require for a period of one year. Jones further attested that she "had a verbal understanding with Benedict Manufacturing that the full quantity of parts shown on those purchase orders would be purchased by the end of one year whether or not Aeroquip had requirements for the parts."For "rings and bands," she attested that "it was intended that Aeroquip was committed to purchase the full quantity of parts shown on those purchase orders within a reasonable period of time, whether or not Aeroquip had requirements for the parts."In other words, Jones claimed that Aeroquip agreed to purchase all the parts ordered-whether within one year or "within a reasonable period of time."

After Jones's retirement in 1994, Julia Corbett-Liles became defendant's buyer for marine parts. Plaintiff's principal, Thomas Benedict, testified that he thought that the purchase orders received from Corbett-Liles would be "business as usual," even though he did not discuss his prior verbal agreements with Jones. Moreover, Benedict also testified that he was aware that the purchase orders received from defendant after Corbett-Liles became defendant's buyer contained contract provisions. Benedict testified that he thought the parties' past practices controlled over those provisions. Thus, plaintiff's position was that defendant was obligated to purchase all parts that were ordered via the purchase orders, regardless of whether defendant actually needed the parts.

Defendant's position was that the purchase orders limited defendant's liability for parts to only those parts that it actually required. Thus, if defendant did not send releases for the shipment of the parts previously referenced in a purchase order, defendant would not have to pay for the parts.[1]

*2 Ultimately, defendant's purchase orders referenced quantities of parts for which it never subsequently issued releases. Plaintiff, relying on its understanding of the estimated number of parts required and of the business practices followed in the past, apparently manufactured the entire number of parts referenced by the purchase orders, incurring labor and material expenses in the process. Defendant paid for the specific number of parts ordered in each release, but refused to pay for the additional parts. Plaintiff therefore filed the instant action, contending that defendant breached its contractual obligation to purchase the entire quantity of manufactured parts.

The trial court granted defendant's second motion for summary disposition pursuant to MCR 2.116(C)(7) ruling that plaintiff's claim was limited by the statute of frauds provision in the UCC to the quantity of parts specified in the purchase orders. MCL 440.2201(1).[2]

II. Standard of Review

"This Court reviews a grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."*Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) where the claim is barred by the statute of frauds.

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(C)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence.... Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v. Kleiman,* 447 Mich. 429, 434, n 6; 526 NW2d 879 (1994). [*Maiden, supra* at 119.]

III. Relevant legal principles

The parties agree that the issues in this case are governed by the UCC as adopted in Michigan. MCL 440.1101*et seq.* The UCC "is to be liberally construed and applied to promote its underlying purposes and policies."*Power Press Sales Co v. MSI Battle Creek Stamping,* 238 Mich.App 173, 180; 604 NW2d 772 (1999), quoting *Shurlow v. Bonthuis,* 456 Mich. 730, 737 n 12; 576 NW2d 159 (1998). One of the UCC's purposes is "to make uniform the law among the various jurisdictions."*Power Press, supra* at 180, quoting MCL 440.1102(2)(c). For that reason, it is appropriate to look to other jurisdictions to seek guidance when interpreting provisions of the UCC. *Id.* Additionally, MCL 440.1103 provides that principles of law and equity shall supplement UCC provisions unless displaced by particular provisions of the UCC itself. Therefore, in the absence of directly controlling UCC provisions, questions are resolved according to general legal principles, i.e., the law of contract interpretation. *Conagra, Inc v. Farmers State Bank,* 237 Mich.App 109, 131-132; 602 NW2d 390 (1999)."The primary goal of contract interpretation is to honor the intent of the parties."*Id.*

***3** Generally, the threshold issue whether contract language is clear or ambiguous is a question of law for the trial court. *Port Huron Ed Ass'n v Port Huron Area School Dist,* 452 Mich. 309, 323; 550 NW2d 228 (1996). Courts must not create ambiguity where none exists. *Mahnick v. Bell Co,* 256 Mich.App 156, 159; 662 NW2d 830 (2003). A contract is ambiguous if the language is susceptible to more than one interpretation or is inconsistent on its face. *Petrovello v. Murray,* 139 Mich.App 639, 642; 362 NW2d 857 (1984). A contract, even if inartfully worded or clumsily arranged, is not ambiguous "if it fairly admits of but one interpretation."*Allstate Ins Co v. Goldwater,* 163 Mich.App 646, 648; 415 NW2d 2 (1987)."Parol evidence is not admissible to vary a contract that is clear and unambiguous, *In re Skotzke Estate,* 216 Mich.App 247, 251; 548 NW2d 695 (1996), but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. *Goodwin v. Orson E Coe Pontiac, Inc,* 392 Mich. 195, 209; 220 NW2d 664 (1974)."*Meagher v. Wayne State Univ,* 222 Mich.App 700, 722; 565 NW2d 401 (1997).

IV. Analysis

Both parties agree that there was a contract between them for the purchase of marine parts;[3] however, they disagree regarding the form of the contract. Plaintiff contends that the contract was an oral contract negotiated over the telephone,[4] that its terms were defined by the parties' prior course of dealing, and that the purchase orders sent by defendant were simply confirmations of the contract. Plaintiff further asserts that, because the purchase orders contained additional terms that materially differed from the parties' established course of dealing, those material

additions were not part of the contract. Defendant contends, on the other hand, that the purchase orders themselves were the contracts, that the contracts were clearly "requirements" contracts[5] under which defendant was only obligated to purchase the quantity specified in each individual contract, and that plaintiff was required to perform according to the terms specified in the purchase orders/contracts.

The court ruled that there was no written contract, as required by the statute of frauds, that the parties' oral contract was evidenced by the purchase orders submitted by defendant, and that plaintiff therefore could enforce the oral contract only to the amount specified in each purchase order. Because, in the trial court's opinion, each purchase order specified a particular quantity of parts, the court determined that the purchase orders satisfied the requirements of the statute of frauds, and therefore plaintiff was precluded from submitting parol evidence to contradict the quantity of parts stated in each individual purchase order.

The UCC statute of frauds provision applies to the sale of goods and the alleged contract(s) in this case concerned the sale of goods, i.e., marine parts; therefore, MCL 440.2201(1) applies to this case. The statute requires (1) a "writing sufficient to indicate that a contract for sale has been made between the parties" and (2) that the writing be "signed by the party against whom enforcement is sought."*Id.*

*4 The only writing that appears to have been generated in this case is the succession of purchase orders that were sent to plaintiff by defendant to trigger manufacture of particular parts. Defendant listed the specific number of each part to be supplied in response to the purchase order, the number of each part being ordered in total, and the agreed upon price for the parts (apparently derived from the parties' oral negotiations). Plaintiff then performed the contract pursuant to its understanding of the agreement: it manufactured the requested number of parts and shipped them to defendant at the agreed upon price and in the agreed upon time frame when it received a release for a particular number of the manufactured parts.

Aside from the fact that the parties agree that a contract was formed for the manufacture and provision of marine parts, their behavior substantiates the existence of a contract because plaintiff manufactured the parts and supplied them to defendant on demand at a negotiated price when it received the purchase orders and releases. MCL 440.2204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

Furthermore, while MCL 440.2201(1) provides that an enforceable contract for the sale of goods over $500 must be in writing, there are statutory exceptions to this requirement. The first exception concerns where a party sends, within a reasonable time, "a writing in confirmation of the contract and sufficient against the sender."MCL 440.2201(2). Because such "confirming writings" must be "sufficient against the sender," they must be "signed" by the sender and contain a statement of quantity. White and Summers, Uniform Commercial Code (4th ed) [White], § 2-5, p 5, see also, *Lorenz Supply Co v. American Standard, Inc,* 419 Mich. 610, 614; 358 NW2d 845 (1984) ("The requirements of § 2-201 are satisfied if the writing indicates that 'a contract of sale has been made between the parties' and 'specif[ies] a quantity.' 2 Anderson, Uniform Commercial Code (3d ed), § 2-201:97, p 61."). Case law indicates that an actual signature is unnecessary; rather, it is enough if the document contains the letterhead or the buyer's name and address. *Cf. Jem Patents, Inc v. Frost,* 147 Ga App 839; 250 S.E.2d 547 (1978). The purchase orders sent by defendant to plaintiff displayed defendant's corporate logo as well as its plant name and address; this was sufficient to satisfy the "signature" requirement.

The purchase orders contained a statement of quantity. In fact, the dispute between the parties centers on the fact that at least some of the purchase orders contained *two* statements of quantity. Based on this difference in the quantity stated, plaintiff maintains that the contract was for the manufacture of a total number of each part that would then be furnished over a period of time as defendant provided individual releases for portions of that total. Plaintiff further claims that the terms of this contract may be explained by consideration of the parties' previous course of dealing or performance. MCL 440.2202(a). Conversely, defendant maintains that each individual purchase order was a contract that was satisfied by the supplying of the parts called for in the purchase order and that reference to the parties' course of dealing or performance was inappropriate because the terms of the contract(s) were contained in the purchase order(s). The trial court concluded that the oral contract was enforceable to the extent of the quantity specified in the purchase orders. MCL 440.2201(3)(b); *Lorenz, supra* at 614.

*5 The purchase orders contained a listing of the part number, a description of the part, a due date (although this was sometimes given as "TBA"-presumably signifying "to be announced"-or the typed date was replaced by a hand-written one), a quantity, a price, some further

descriptive notations, and an account number. The "NB" purchase orders also contained the following language:

> This purchase order is issued to cover 100% of Aeroquip Division requirements. Specified quantities to be manufactured will be authorized on a release and shipping schedule. This order is subject to reduction or cancellation on evidence of failure to meet Aeroquip's delivery and/or quality requirements. Estimated annual quantities are to be reviewed by Aeroquip and adjusted in demand. Price is to remain firm for the life of this contract.
>
> Estimated annual quantity =
>
> Minimum release quantity =

The "NC" purchase orders followed the above language with statements such as: "Bath 3 yr prices" and "Total Contract = 278 pcs."[6] This created an ambiguity between the two different statements of quantity. Even the "NB" purchase orders were ambiguous with respect to the quantity terms because there was a stated order quantity at the top of the document, but there were also blank provisions for "Estimated annual quantity = ___" and "Minimum release quantity = ___" further down in the contract. Therefore, particularly with respect to the "NC" purchase orders, the typical order included a listing of quantity at the top and a subsequent listing of total quantity without an explanation of the significance of these two figures.

Given these two statements of quantity, and the purchase order language that "This purchase order is issued to cover 100% of Aeroquip Division requirements. Specified quantities to be manufactured will be authorized on a release and shipping schedule," it was equally reasonable to conclude that a purchase order constituted an order for only the quantity of parts listed at the top of the purchase order *or* that the purchase order requested provision of a total number of parts with only a portion of those parts to be sent in response to a subsequently filed release.

MCL 440.2202 provides, in relevant part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement *but may be explained or supplemented*
>
> (a) by course of dealing or usage of trade (section 1205) or by course of performance (section 2208)[.]

MCL 440.2202 permits the parties to explain or supplement the terms of a confirmatory memorandum "by course of performance" pursuant to MCL 440.2208(1).[7] Plaintiff has maintained that the parties' course of performance when executing previous similar contracts for marine parts clearly demonstrated that plaintiff was required to manufacture the total amount of parts initially estimated by defendant (which permitted plaintiff to provide the lowest possible cost-per-part estimate), supply specific quantities from this total as defendant presented a succession of releases, and that, in turn, defendant was required to ultimately purchase the total number of parts it had originally estimated.

***6** The trial court ruled that consideration of the parties' course of dealing or performance was not permissible because there was no ambiguity in the contract to resolve by considering evidence of the parties' course of performance. But, given that the trial court concluded that the contract was an oral contract that was enforceable to the extent of the quantity listed in the purchase order, an ambiguity in the quantity term stated in the purchase orders would call for a parol evidence explanation. MCL 440.2202. Moreover, "Parol evidence ... may be admissible to prove the existence of an ambiguity."*Meagher, supra* at 722.This Court in *In the Matter of the Estate of Frost,* 130 Mich.App 556, 561; 344 NW2d 331 (1984), approvingly quoted the holding of two Washington cases:

> " 'When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity,' * * * but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term.*Alaska Independent Fisherman's Marketing Ass'n v New England Fish Co,* 15 Wash App 154, 159-160; 548 P.2d 348 (1976), quoting *Hankins v American Pacific Sales Corp,* 7 Wash App 316; 499 P.2d 214 (1972).

Contrary to the trial court's view, we find that the listing of two different quantities (or a stated quantity followed by a blank provision for an "Estimated annual quantity" and a "Minimum release quantity" was an ambiguity in the contract language. Parol evidence was therefore properly "admissible to prove the existence of [this] ambiguity and to clarify the meaning of an ambiguous contract."*Id.*

Moreover, defendant does not dispute that the parties had conducted business for a number of years with plaintiff manufacturing parts according to defendant's

specifications or that the manufactured parts were supplied to defendant in accordance with the submission by defendant of purchase orders and releases. Pursuant to MCL 440.2208(1), this course of performance was relevant and admissible to explain or supplement the quantity terms that were contained in the purchase orders. *Frost, supra* at 564, citing MCL 440.2202, Comment 2 ("the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.").

Defendant points to the "requirements" language in its purchase order and asks this Court to conclude that this language limited plaintiff to manufacturing only the quantity listed at the top of the purchase orders. However, acceptance of this position would require us to focus on the "requirements" language while at the same time ignoring the "quantity" language that follows after the "requirements" language. This we will not do.

We therefore conclude that, although a quantity is stated in the purchase orders sufficient to take this case out of the statute of frauds, the quantity term is nonetheless ambiguous and parol evidence was admissible to explain the ambiguity. MCL 440.2202(a); *Frost, supra* at 562-563; *Meagher, supra* at 722.The trial court's decision granting summary disposition to defendant is therefore reversed and this case is remanded to the trial court for further proceedings.

*7 Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Parallel Citations

53 UCC Rep.Serv.2d 888

Footnotes

1 The orders in question were divided between orders prefixed with "NB" or "NC." The NB prefix referred to parts intended to fulfill a government contract for the manufacture of six ships by the Bath Iron Works in Bath, Maine, while the NC prefix orders related to parts sought to fill general customer requirements.

2 At the time relevant to this appeal, MCL 440.2201(1) provided:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

The primary change accomplished by the 2002 amendment of this provision was to increase the dollar limit to $1,000. 2002 PA 15.

3 There is no dispute that defendant ordered various marine parts from plaintiff and that defendant has paid for those parts it has actually obtained. In fact, even after this action commenced, defendant has continued to periodically send releases for additional parts plaintiff had previously manufactured based on its understanding of the parties' agreement. This lawsuit therefore concerns only those parts previously manufactured by plaintiff but as yet not purchased by defendant.

4 The parties did not execute a writing incorporating the terms of their oral telephonic negotiations.

5 A requirements contract has been described as one "in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller."*Propane Industrial, Inc v. General Motors Corp,* 429 F Supp 214, 218 (WD Mo, 1977). The UCC accepts the validity of such contracts. MCL 440.2204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."). See also MCL 440.2306.

6 It was also not explained why the "NC" orders-related to other customer orders-would make reference to "Bath 3 yr prices" when it was the "NB" orders that covered the orders for the Bath Iron Works.

7 MCL 440.2208(1) provides, in relevant part:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

End of Document

TAB G

2005 WL 736519

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PLASTECH ENGINEERED PRODUCTS,
Plaintiff/Counter
Defendant-Appellant/Cross-Appellee,
v.
GRAND HAVEN PLASTICS, INC.,
Defendant/Counter Plaintiff/Third-Party
Plaintiff/Appellee/Cross-Appellant,
and
JOHNSON CONTROLS, INC., Third-Party
Defendant/Cross-Appellant/Cross-Appellee.

No. 252532. | March 31, 2005.

Before: ZAHRA, P.J., and NEFF and COOPER, JJ.

Opinion

UNPUBLISHED

PER CURIAM.

*1 In this interlocutory appeal of the parties' contract dispute, plaintiff/counter-defendant Plastech Engineered Products (Plastech) appeals by leave granted the trial court's denial of its motion for summary disposition. Defendant/counter-plaintiff/third-party plaintiff Grand Haven Plastics (GHP) and third-party defendant Johnson Controls, Inc. (JCI) cross appeal. We affirm in part, reverse in part, and remand.

I. Background

This case arises from a dispute between Plastech and GHP, both competitor-suppliers to JCI, which produces and supplies molded plastic components for the automotive industry. In 2001, JCI outsourced control of its supply contracts to Plastech, which included JCI's purchase orders (PO's) placed with GHP. When GHP refused to accept new PO terms and conditions imposed by Plastech, Plastech cancelled all production PO's issued to GHP. Plastech subsequently filed an action against GHP for claim and delivery of production tooling held by GHP. GHP filed a counterclaim alleging, among other claims, breach of contract (Count I). GHP also filed a third-party complaint against JCI, alleging, among other claims, breach of contract (Count III), "breach of contract-interference of contractual relations" (Count IV), and "breach of contract-third party beneficiary" (Count V).

This Court granted Plastech leave to appeal the October 23, 2003, order of the trial court, denying Plastech's motion for summary disposition of the breach of contract counterclaim. GHP cross-appeals the trial court's determinations concerning GHP's contracts with JCI and the trial court's grant of summary disposition in favor of JCI with respect to GHP's breach of contract, tortious interference of contract, and third-party beneficiary claims against JCI. JCI cross appeals the grant of summary disposition, seeking affirmance on various grounds.

II. Standard of Review

This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10).[1] *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v. Globe Life Ins Co*, 460 Mich. 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

"[A] party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted."[2] *Smith, supra* at 455-456 n 2. A party moving for summary disposition has the initial burden of supporting its motion by affidavits, depositions, admissions or other documentary evidence. *Id.* at 455. The opposing party then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id.*" 'Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.' " *Id.*, quoting

Quinto v. Cross & Peters Co, 451 Mich. 358, 362; 547 NW2d 314 (1996).

III. Factual Context

*2 The parties' dispute arises from an ongoing contractual relationship between GHP and JCI, which was subsumed by Plastech under a Sourcing Agreement entered between JCI and Plastech on October 5, 2001.[3]Before the Sourcing Agreement, for more than twenty years, GHP contracted directly with JCI, and previously with JCI's predecessor, Prince Corporation, to supply plastic parts to JCI. GHP was considered a "partner molder," a supplier that was given preferential consideration by Prince, a relationship that allegedly continued with JCI as a "key preferred provider." Likewise, Plastech, a designer and manufacturer of interior trim components for automotive applications, was also parts supplier to JCI.

The standard course of dealing between GHP and JCI was that, when JCI wished to have GHP fabricate a specific component, JCI issued a Request for Quotation (RFQ) to GHP, which contained the specifications for the part. GHP would then analyze the specifications and provide JCI a formal quotation, which indicated that it could produce the part for JCI at a specific cost over a specific period of time. If JCI wished to accept the quotation, it responded to GHP with a purchase order. Over the course of their relationship, GHP had produced parts for JCI through a succession of purchase orders. Additionally, GHP and JCI had negotiated other agreements concerning their business together through various written communications.

In that regard, in Count I of GHP's countercomplaint, GHP alleged that in 2000 it was under contract with JCI to produce plastic component parts under the program titles "Windstar side panels" and "GM-270 panels," amongst others. Further, in November 2000, GHP and JCI entered into discussions regarding the cancellation of these two product orders and the movement of manufacturing work for these products from GHP to a plant controlled by JCI. According to GHP, as partial compensation for canceling the panel orders, JCI committed in writing not to pull future business from GHP. The writing referenced by GHP is a letter written on JCI letterhead, dated January 9, 2001, and signed by Matthew Ahearn, "Purchasing-Petro Chemical Commodity." This letter contained the following pertinent text:

The purpose of this letter is to formally address the issue of moving business from Grand Haven Plastics. I hope this helps clarify and answer any open questions or issues.

Johnson Controls recently has targeted business from all key preferred and non-preferred suppliers to fill the current capacity void at the JCI Holland campus. As you are aware, Johnson Controls has targeted the GMX 270 and WindStar programs from Grand Haven Plastics to fill open capacity at the Lakewood facility. We very much appreciate how Grand Haven Plastics has helped Johnson Controls work through this very difficult situation.

To bring closure to the GMX/WindStar tooling moves, Johnson Controls is committing not to pull any future business from Grand Haven Plastics to fill internal capacity needs. It is our hope to grow the business at Grand Haven Plastics in the very near future.

*3 On October 5, 2001, JCI and Plastech entered into a "Plastic Components Sourcing Agreement." This agreement obligated Plastech to "manage the design, the engineering, the production and the supply of certain injection molded and blow molded component parts for JCI...." It also allowed Plastech to manage JCI's current suppliers or "to terminate relationships with some or all of those suppliers in order to manufacture the Products itself."According to GHP, JCI notified GHP of this agreement on November 29, 2001.

Following the transfer of control of GHP's supply contracts from JCI to Plastech, disputes arose between GHP and Plastech concerning new terms and conditions imposed by Plastech for the contracts. In March 2002, GHP informed Plastech that the new purchase order terms and conditions were unacceptable to GHP and that GHP considered JCI still bound to its contractual obligations to GHP, including the agreement to exempt current products from future price down requests, the agreement not to pull work to fill internal capacity, and the agreements with respect to GHP's expansion that was done at JCI's request on the basis of JCI's representations regarding future work.

Plastech informed GHP by letter dated June 20, 2002, that it would be canceling at a future date to be determined "all production purchase orders," including "all business placed by Plastech with GHP including, but not limited to, all JCI business that had previously been placed with GHP under purchase orders issued by JCI."Additionally, by this same letter, Plastech demanded a return of JCI's tooling and equipment used by GHP. This action followed.

IV. Breach of Contract

Although the parties present numerous issues on appeal, there are two key questions for this Court's decision with regard to breach of contract. First, did the trial court err in determining that GHP has a meritorious breach of contract claim, and therefore err in denying Plastech's motion for summary disposition? Second, if GHP has a viable breach of contract claim, did the court err in ruling that liability rests only with Plastech and not with JCI, and therefore err in granting JCI's motion for summary disposition? We hold that the trial court properly denied Plastech's motion for summary disposition, although certain determinations were erroneous, as discussed below. We further hold that the trial court's grant of JCI's motion for summary disposition on the basis of an assignment to Plastech was improper.

A

It is undisputed that the breach of contract claim, based on the purchase order, is governed by the Uniform Commercial Code (UCC), MCL 440.1101*et seq.* Under the UCC, a contract for sale may be made in any manner sufficient to show agreement, even though the writings of the parties do not otherwise establish a contract. 21 Michigan Civil Jurisprudence, Sales and Leases under the UCC, § 11, p 201. In those cases, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under the Code. *Id.*

*4 Count I of GHP's countercomplaint against Plastech and Count III of GHP's third-party complaint against JCI allege identical factual allegations underlying the breach of contract. A key question in the parties' dispute is whether the JCI PO, covering the parts orders terminated by Plastech, constitutes an integrated agreement. It is undisputed, as the trial court found, that the PO's at issue contain an integration clause, which states:

> This purchase order ... contains the final and entire contract between Purchaser and Seller, and no agreement or other understanding purporting to add to or modify the terms and conditions herein (sic ["hereof"]) shall be binding upon Purchaser unless agreed to by Purchaser in writing on or subsequent to the date of this purchase order.

However, the integration clause was contained only in JCI's PO, presumably the "acceptance" in this case, and not in GHP's quotation, presumably the "offer." Unlike cases in which the parties' agreement is contained in a single writing, which includes an integration clause to which both parties unquestionably agreed, in this case, it is disputed whether the clause becomes part of the contract. Consequently, the parties disagree whether the breach of contract claim is governed exclusively by the terms and conditions of the purchase order or whether other agreements between JCI and GHP also apply, specifically the Ahearn letter.

The trial court resolved this issue by stating as an initial matter that the contract at issue was the "panels contract," under which GHP produced parts known as "Windstar side panels" and "GM-270 panels." Applying a "battle of the forms" analysis, MCL 440.2207, the court then concluded that the PO was an integrated agreement because although the integration clause was an additional term, it did not materially alter the terms of the quotation, and it therefore became part of the contract, MCL 440.2207(2). The court further concluded that a genuine issue of material fact existed with regard to whether the Ahearn letter modified the panels contract. On reconsideration, the court rejected Plastech's claim that it interpreted the wrong contract, explaining that GHP's countercomplaint "pleads that Plastech breached the panels contract, as amended by the Ahearn letter, by 'pulling work' from GHP...."

B

On appeal, Plastech and JCI argue that the trial court erred in analyzing the contract claim in the context of the "panels contract," which was terminated by JCI before it entered into the sourcing agreement with Plastech.[4]We agree.

The trial court determined that the integration clause in the purchase order did not bar consideration of the January 9, 2001, Ahearn letter because the letter postdates the last PO for the "panels contract," which is dated August 7, 2000, and therefore, there was a question of fact whether the Ahearn letter modifies the panels contract as an agreement subsequent to the integrated purchase order. However, the "panels contract" was terminated long before the contracts at issue in this action were terminated by Plastech. It is undisputed that the panels contract tooling was returned to JCI pursuant to the termination agreement at the time. The termination and demand for tooling now at issue involves PO's other than

the panels contract. We agree with Plastech that the dates of panels contract PO's are not a proper context for resolving the question of integration for subsequent PO's.

*5 GHP argues that the trial court did not err in basing its decision on the panels contract because the Ahearn letter modified the panels contract and the obligations of the Ahearn letter were operative at the time of the Sourcing Agreement. Nonetheless, subsequent PO's contained the integration clause, which, if operative, would preclude evidence of the so-called modified panels contract. The issue in this case is whether Plastech and JCI breached the contract by terminating the subsequent PO's. For purposes of the integration analysis, the date of the panels contract is irrelevant.

C

The next consideration is whether the later PO contracts terminated by Plastech were nevertheless integrated and therefore preclude consideration of the Ahearn letter.[5]We agree with the trial court that this question is properly resolved under MCL 440.2207, "as a battle of the forms."Section 2207 provides, in relevant part:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. [MCL 440.2207.]

The acceptance, JCI's PO, contains an additional term. In this case, only subdivision (b) is applicable, and therefore, the additional term, the integration clause, becomes part of the parties' contract unless it materially alters the contract. The trial court did not analyze whether the integration clause materially alters the parties' agreement, but merely stated that it did not.

We find no Michigan case that has addressed whether an integration clause is considered a material alteration. The general rule for determining whether an additional term is a material alteration is whether the alteration " 'results in surprise or hardship if incorporated without the express awareness by the other party." ' *American Ins Co v. El Paso Pipe & Supply Co,* 978 F.2d 1185, 1189 (CA 10, 1992), quoting Official Comment 4 to UCC 2-207. The majority of the courts reviewing whether an additional term is a material alteration hold that it depends on the unique facts of each particular case. *American Ins Co, supra* at 1190.

The determination whether a term results in surprise or hardship requires a factual evaluation of the parties' position in each case. *Id.* Courts should determine whether a nonassenting party knew or should have known that such a term would be included. *Id.* at 1191.Courts should consider many factors in determining whether a party was unreasonably surprised by an additional term, such as prior course of dealing; the number of confirmations exchanged; absence of industry custom; whether the addition was clearly marked; and whether the addition is contained within the party's own standard contract. With regard to hardship, "the analysis of the existence of hardship focuses on whether the clause at issue 'would impose 'substantial economic hardship' on the nonassenting party." ' *Id.* (citations omitted).

*6 Given the analysis required in assessing whether an additional term is a material alteration and the fact that the court failed to apply this analysis, we remand this case to the trial court to address this analysis in the first instance, which provides the parties opportunity for argument on this point.

D

The merit of the parties' remaining arguments hinge to a certain extent on the trial court's preliminary determinations. We briefly address key arguments to the extent that they will bear on the ultimate determination in the trial court following this appeal.

1

The parties dispute whether the PO constitutes a "requirements contract." JCI's PO states: "Scheduled

Purchase Order to cover 100% Johnson Controls requirements."Under the UCC, a contract for sale may be established even though the price is not settled. 21 Michigan Civil Jurisprudence, Sales and Leases under the UCC, § 13, p 202. Likewise, a contract for sale may measure the quantity by the output of the seller or the requirements of the buyer, measuring such output or requirements as may occur in good faith. *Id.* at § 14, p 203.

GHP argues that the PO contracts are requirements contracts, which impose a duty on behalf of the parties to act in good faith and that this duty of good faith "undermines JCI's position that it could, without reason, warning or liability, terminate a requirements contract at will."We conclude that GHP's argument has merit and warrants further consideration in the trial court.

MCL 440.2306 provides:
(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

In applying Michigan law, the court in *Gen Motors Corp v Paramount Metal Products Co,* 90 F Supp 2d 861, 873 (ED Mich, 2000) stated:
Comment 2 to the statute reads: "Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure."' 'A promise to buy of another person or company all *or some of* the commodity or service that the promissor may thereafter need or require in his business is not an illusory promise and such a promise is a sufficient consideration for a return promise.'Corbin, 1A Corbin on Contracts § 156 (1963)."*Precision Rubber Products Corp v George McCarthy, Inc,* 872 F.2d 187, 188 [(CA 6, 1989)] (emphasis added).

*7 The court in *Gen Motors Corp, supra,* concluded that under Michigan's version of the UCC, pursuant to Comment 2, the plaintiffs owed a contractual duty to execute the purchase order in good faith and according to commercial standards of fair dealing in the trade. *Id.* at 873; see also *Fashion House, Inc v. K Mart Corp,* 892 F.2d 1076, 1085 (CA 1, 1989)."If, in bad faith or inconsistent with commercial standards of fair dealing, the plaintiffs exercised a unilateral right not to purchase seat frames or to terminate the purchase orders, the plaintiffs would be subject to liability for breach of contract."*Gen Motors Corp, supra* at 873.

Plastech asserts that a requirements contract must obligate the buyer to buy goods exclusively from the seller and must obligate the buyer to buy all of its requirements for goods of a particular kind from the seller. However, in *Gen Motors Corp, id.,* the court concluded that MCL 440.2306 expresses a legislative intent to enforce both exclusive and non-exclusive requirements contracts. Also contrary to Plastech's assertion, the PO provision that it was terminable at will does not preclude a finding that the PO was a requirements contract.

Plastech also argues that the PO's were not requirements contracts because they lacked a minimum quantity requirement. However, Comment 3 to MCL 440.2306 states: "If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur."In this case, the communications between the parties allegedly contained estimates of output or requirements.

If the PO's constituted requirements contracts, then Plastech's unilateral termination of the PO's may constitute a breach of contract, independent of the Ahearn letter. Further, the finding of a requirements contract also imposes standards with regard to the duration of the contract, thereby affecting the analysis of the duration issue and whether the parties' contract was terminable at will.

With regard to duration of the contract and whether it was terminable at will, the trial court found that ¶ 7 in the purchase order, that indicated that the contract could be terminated at any time, conflicted with terms in the quotations that stated different prices for the panels for

five different years.[6]The court determined that pursuant to § 2207, these different terms "knock each other out," and that as a result, the contract became silent as to duration. The court then applied the "gap filler" found in MCL 440.2309(1) and concluded that the duration of the panels contract was for a "reasonable time." The court noted that what constituted a reasonable time was generally a question of fact and therefore the duration of the contract constituted a question of fact.

*8 MCL 440.2309 provides:
(1) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

We disagree with the arguments of Plastech and JCI that on the basis of GHP's pleadings and arguments, the PO provision stating that the PO was terminable at will governs despite any evidence in the quotations to the contrary. As noted above, the quotations presumably were an offer and the PO was an acceptance. Accordingly, the two documents must be considered together and § 2207 is applicable. In any event, we conclude that legal and factual questions preclude any determination by this Court with regard to whether the contract was terminable at will.

E. Statute of Frauds

JCI argues that the Statute of Frauds applies to bar GHP's claims and that there was no writing to support a claim to "life of the part" damages. GHP responds that there are numerous documents to support its claims pursuant to MCL 440.2201(1). We are unpersuaded by JCI's argument.

MCL 440.2201 provides:
(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of $1,000.00 or more is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the writing.

(2) Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against the party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract that does not satisfy the requirements of subsection (1) but is valid in other respects is enforceable in any of the following circumstances:

(a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.

*9 (b) If the party against whom enforcement is sought admits in his or her pleading or testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this section beyond the quantity of goods admitted.

(c) With respect to goods for which payment has been made and accepted or that have been received and accepted under [MCL 440.2606].

It is noteworthy that MCL 440.2606(2), addressing acceptance, states that acceptance of any part of a commercial unit is acceptance of that entire unit. Further, an oral agreement may become enforceable through performance. *Power Press Sales Co v. MSI Battle Creek Stamping,* 238 Mich.App 173, 179; 604 NW2d 772 (1999). Accordingly, we are unconvinced that JCI was entitled to summary disposition on the alternative ground that the statute of frauds is not met. Nonetheless, given the limited record in this interlocutory appeal, should the facts or law warrant further consideration of this issue, the determination is properly made by the trial court on remand.

V. Assignment

GHP argues that the trial court erred in ruling that the Sourcing Agreement assigned to Plastech JCI's rights and obligations under the contracts and therefore JCI was not liable to GHP for breach. Given the arguments and evidence, we agree.

As GHP notes, under the UCC, MCL 440.2210(1), an assignment does not necessarily relieve JCI of liability. MCL 440.2210, entitled "Delegation of performance; assignment of rights," provides, in part:

(1) A party may perform that party's duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having that other party's original promisor perform or control the acts required by the contract. *No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.*

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on the other party by that other party's contract, or impair materially the other party's chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his or her entire obligation can be assigned despite agreement otherwise.

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by the assignee to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract. [Emphasis added.]

The trial court did not address the import of § 2210. The arguments of Plastech and JCI on appeal do not indicate whether § 2210 is applicable to the assignment in this case. Resolution of the assignment issue is critical to a proper consideration of other issues presented in this case.[7] Given the limited argument and authority cited, we agree with GHP that the court erred in finding that JCI had no liability in light of its assignment under the Sourcing Agreement. Absent authority or facts to the contrary on remand, under § 2210(1) JCI is not relieved of liability to GHP by the assignment.

VI. Third-Party Beneficiary

***10** GHP argues that the trial court erred in determining that the assignment by JCI to Plastech of the contract between GHP and JCI did not create any third-party beneficiary rights in GHP for which JCI is liable. We disagree.

MCL 600.1405 provides in relevant part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Only intended third-party beneficiaries, not incidental beneficiaries, may enforce a contract under § 1405. *Koenig v. South Haven,* 460 Mich. 667; 680, 694; 597 NW2d 99 (1999); *Greenlees v. Owen Ames Kimball Co,* 340 Mich. 670, 676; 66 NW2d 227 (1954); "A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof."*Kammer Asphalt Paving Co, Inc v East China Twp Schools,* 443 Mich. 176, 190; 504 NW2d 635 (1993), quoting *Greenlees, supra.*"Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract."*Dynamic Const Co v. Barton Marlow Co,* 214 Mich.App 425, 428; 543 NW2d 31 (1995). Whether the parties to the contract intended to make a third person a third-party beneficiary should be examined under an objective standard. *Id.* at 427.

Contrary to GHP's argument, the record does not support a conclusion that GHP was an intended beneficiary of the Sourcing Agreement. GHP has produced no admissible proofs to show that the Sourcing Agreement was not intended for the benefit of Plastech and JCI and that the benefit to GHP, if any, was incidental.

VII. Tortious Interference of Contractual Relations

GHP argues that the trial court erred in granting summary disposition of its claim of breach of contract-tortious interference of contractual relations against JCI (Count IV of the third-party claim against JCI). Although the resolution of this question in part hinges on the final resolution of other issues in this case, such as assignment, we find no error given our determination that the trial court improperly granted JCI's motion for summary disposition on the basis of the Sourcing Agreement.

The trial court concluded that JCI was not liable for breach of contract following the assignment. Accordingly, GHP validly contends that a claim for tortious interference is viable because JCI is not a party to the contract that was breached: "Either JCI is a party to the contract and is responsible for the breach, or it is not a party to the contract and is responsible for tortious interference causing the breach."

*11 Although the trial court erred in granting summary disposition of GHP's tortious interference claim on the basis of the assignment, it nonetheless reached the right result. To maintain a cause of action for tortious interference, a plaintiff must establish that the defendant was a "third party" to the contract or business relationship. *Reed v Michigan Metro Girl Scout Council,* 201 Mich.App 10, 13; 506 NW2d 231 (1993). GHP's claim, based on the original contracts between GHP and JCI, provide no basis for a claim of tortious interference against JCI. This Court may affirm a trial court's ruling when it reaches the right result but for the wrong reason. *Etefia v. Credit Technologies, Inc,* 245 Mich.App 466, 470; 628 NW2d 577 (2001).

VIII. Conclusion

This interlocutory appeal raises numerous issues that are not properly resolved without further argument by the parties and reconsideration by the trial court in the proper context. We therefore reverse the trial court's erroneous rulings on the essential issues and remand for further proceedings consistent with this opinion.

With regard to Plastech's appeal, we affirm the denial of Plastech's motion for summary disposition of GHP's counterclaim for breach of contract. Although the trial court erred in deciding the issues in the context of the panels contract, genuine issues of material fact preclude the grant of summary disposition in favor of Plastech.

With regard to GHP's cross-appeal, we reverse the grant of summary disposition in favor of JCI with regard to GHP's third-party claim against JCI for breach of contract on the basis of an assignment. As with Plastech, genuine issues of material fact preclude the grant of summary disposition in favor of JCI. We affirm the grant of summary disposition in favor of JCI with regard to GHP's claim for breach of contract-tortious interference of contractual relations. We affirm the trial court's grant of summary disposition in favor of JCI with regard to GHP's breach of contract claim on a third-party beneficiary theory.

With regard to JCI's cross-appeal, as noted above, genuine issues of material fact remain concerning JCI's liability for breach of contract. JCI is therefore not entitled to summary disposition on the alternative grounds presented.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Parallel Citations

56 UCC Rep.Serv.2d 910

Footnotes

1 Although the trial court did not specifically articulate which subrule it relied on in deciding the motions, the court relied on matters outside of the pleadings. Therefore, review is properly under MCR 2.116(C)(10) rather than subrule C(8).*Maiden v. Rozwood,* 461 Mich. 109, 118-120; 597 NW2d 817 (1999); *Driver v. Hanley (After Remand),* 226 Mich.App 558, 562; 575 NW2d 31 (1997).

2 GHP bases its arguments on an incorrect standard of review, relying on a former standard that was overruled in *Smith, supra.*The test is not "whether the record which might be developed ... results in a genuine issue upon which reasonable minds might differ."*Id.* at 455 n 2.

3 The facts are stated herein for purposes of this interlocutory appeal, and they are not intended to be dispositive of any disputed factual issues on remand.

4 GHP argues that this issue is unpreserved; however, it was raised before and addressed by the trial court on reconsideration.

5 The parties do not identify the specific dates of the PO's that were terminated by Plastech, although from the arguments, it appears that the PO's postdate the Ahearn letter, and therefore the matter of integration may be dispositive.

6 While it does not appear that this analysis would be different viewing a contract other than the panels contract, the trial court's analysis was specific to the panels contract and, therefore, may be subject to reconsideration on remand if a difference exists.

7 For example, GHP argues that if an assignment occurred, then Plastech "stands in the shoes" of JCI, and Plastech's action of reassigning GHP's contract work to Plastech would violate the commitment of the Ahearn letter. Likewise, if an assignment and delegation occurred, then the parties' positions with respect to GHP's tortious interference of contractual relations arguably changes. A question arises whether JCI could then be liable on a theory of tortious interference since it is technically not a party to the contract.

End of Document

TAB H

2008 WL 582566
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

FOAMADE INDUSTRIES, Plaintiff-Appellant,
v.
VISTEON CORPORATION, Defendant-Appellee.

Docket No. 271949. | March 4, 2008.

West KeySummary

1 **Judgment**
Sales Cases in General

Questions of fact existed as to whether parties agreed that buyer would purchase all the air cleaners required for air filters from seller for the life of the program, and therefore the trial court erred in granting summary disposition in favor of buyer on seller's claim that buyer improperly charged it for the costs of product testing. Both of seller's proposed options included pricing for high-volume production, and nothing in buyer's confirmation letter suggested that buyer only accepted seller's proposal with respect to low-volume production. Seller's letter to buyer also stated that all pricing presumed a contract for the life of the program, and that the contract was only for the volumes that were required of buyer. M.C.L.A. §§ 440.2101, 440.2102, 440.2207.

Cases that cite this headnote

Wayne Circuit Court; LC No. 05-510206-CK.

Before: WHITBECK, P.J., and OWENS and SCHUETTE, JJ.

Opinion

PER CURIAM.

*1 Plaintiff Foamade Industries ("Foamade") appeals as of right the Wayne Circuit Court's order dismissing its claim that defendant Visteon Corporation ("Visteon") improperly charged it for the costs of product testing, which was the final order dismissing Foamade's remaining claims and closing the case. However, Foamade's arguments on appeal pertain to the trial court's May 12, 2006, order granting Visteon's motion for summary disposition and dismissing with prejudice "Foamade's claim arising from an alleged agreement between Visteon and Foamade for the 'life of the program' of certain Long Life Air Filters...." We reverse and remand.

This case arises from the business relationship between Foamade and Visteon concerning an air cleaner that Foamade supplied to Visteon for use in Visteon's long-life air filters, which Ford Motor Company installed in its air induction systems used in low-emissions Ford Focus vehicles. The parties worked together to develop the long-life air filter and negotiated for several months concerning the price of supplies and other costs. On March 11, 2002, Michael Egren, Foamade's then-president,[1] sent a letter to Frederick Botero of Visteon's commodity purchasing division proposing two options for supplying filters to Visteon. The letter states in pertinent part:

> I thought we had a productive meeting on Friday. My impression is that we all agree that it makes sense to start with a smaller inventory for the low volume production and then change to the high-volume equipment when the risks justify it.
>
> Below are revised proposals based on my recent meetings with Foamex, and our meeting on Friday:
>
> *OPTION 1*
>
> This is an update reflecting our supplier's agreement to provide materials the first year at higher volume pricing. As we discussed, it still amortizes the low-volume equipment costs over the low-volume parts, and the high-volume equipment cost over the high-volume production.

Pricing off low-volume equipment: $7.65 ea.

Tooling: $21,000

Equipment capacity: 240,000/yr

If program remains at low volumes the price will reduce to $5.67 after 90,000 parts are produced, and then 3% per year for years beginning 2005 and 2006.

Pricing at implementation of high-volume line: $5.83

3% reductions beginning years 2005, 2006, & 2007.

Tooling: $60,000

Equipment capacity: 1,100,000/yr

After 1,370,000 parts (off high-volume line) are shipped, the price will be reduced by an additional $.58 ea.

Therefore, the price after the 3% reductions and amortization are complete will be $4.74 ea for this project.

Note that if we start high-volume equipment earlier than 90,000 parts, we will still need to recover the unamortized amount at $1.98 ea. This can be negotiated either as a lump sum payment or spread over the high-volume pricing.

OPTION 2

This is a new option based on our meeting, and Visteon's desire to lower the price of the first year production. To accomplish this we amortized part of the cost of the low-volume equipment required, across the high volume pricing.

Pricing off low-volume equipment: $6.07 ea.

Tooling:	$21,000
Capacity:	240,000/yr

*2 If volume stays low, and justification for high-volume equipment doesn't exist, there can be no price reduction.

Pricing at implementation of high-volume line:	$5.98

3% reductions beginning years 2005, 2006, & 2007.

Tooling:	$60,000
Equipment capacity:	1,100,000/yr

After 1,370,000 parts (off the high-volume line) are shipped the price will be reduced by an additional $.73 ea.

Therefore, the price after the 3% reductions and amortization are complete will be $4.74 ea for this project.

Note that if we start high-volume equipment earlier than 90,000 parts, we will still need to recover the unamortized amount at $.40 ea. This can be done either by lump sum payment or spread over the high-volume pricing.

Projected Volumes

2003	60,000

SUMMARY

The 3% price reductions assume we reasonably attain the projected volumes, and chemical costs do not increase more than 10%. Likewise, chemical cost reductions that impact our material costs will be passed on as additional savings. The dates of the 3% reductions also presume a startup around January 2003.

2004	400,000
2005	400,000
2006	400,000
2007	200,000

All pricing presumes a contract for the life of the program on the Focus. We realize the volumes and project are dependent on Ford's production and plans, and that our contract is only for the volumes that Ford requires of Visteon.

* * *

I believe this proposal gets close to meeting your targets and results in minimizing risks for both of us. Please contact me when you've had a chance to review this to determine if this approach works. There are obviously some variations we could look at, but I welcome your feedback on this concept.

Botero responded by email on March 12, 2002. He wrote, "FYI, the program and I have accepted this proposal and I will be sending you a sourcing confirmation letter shortly for this part."Botero sent a sourcing confirmation letter dated March 12, 2002, to Darryl Walker, who managed Foamade's account with Visteon at this time. The letter stated in pertinent part:

Congratulations, Foamade has been selected as the supplier for the long life engine air filter program for the C170. Welcome to the program team! For confirmation purposes, pricing for VP3 S4U-9601-AA is $7.65 (assumes expendable dunnage) FOB Auburn Hills, MI, tooling is $81,000 and minimum productivity is 3%/year for the life of the program. Price reductions based on capacity investment and amortization will be in accordance with your letter dated March 11, 2002 (option # 1). This sourcing is valid assuming that Foamade and Visteon will work together on VA/VE[2] opportunities to further improve cost savings.

* * *

Please note that actual orders and volumes will be subject to [Ford's] releases and timing. Visteon Terms & Conditions will apply to this sourcing agreement and all subsequent commercial events.

*3 Prior to full production, a Purchase and Supply Agreement based on Visteon's standard purchase order terms and conditions will be issued which incorporates the pricing above unless either or both of the following occur:

(i) Visteon makes a change in program or subsystem/end-item component direction;

(ii) Your company is unable to continue with design and development of the subsystem/end-item component or carry out all of the responsibilities associated with this Agreement;

in which case Visteon and your company will each absorb their own cost of work for this program....

* * *

To confirm this sourcing agreement, please sign below and return to me. Visteon Corporation looks forward to

working with you on this program.[3]

Visteon issued a purchase order to Foamade on March 19, 2002, listing the cost of the air cleaner as $7.65. On April 6, 2002, Egren sent Botero an email indicating that he had reviewed the sourcing confirmation letter and "attached a marked copy showing a few changes we require to Visteon's standard terms and conditions."The attachment listed eight objections to these terms and conditions, but included no reference to Visteon's termination provision. Egren also noted in his email that, because timing was critical, the parties' focus up to that point had been on reaching an agreement on pricing, and they had not had the opportunity to "meaningfully negotiate the global terms," which he described as "overreaching, burdensome, or inappropriate under the circumstances...." On April 8, 2002, Botero replied to Egren's email and indicated that Visteon would not accept the proposed changes. Visteon later issued at least two additional purchase orders to Foamade. These purchase orders reflected changes in the price of supplies resulting from engineering changes and were not challenged by Foamade.

By March 2004, Visteon had decided to "re-source" the air cleaner business to another supplier. On April 1, 2004, Visteon issued a new purchase order, which Foamade received on April 12, 2004. This purchase order differed from the others in that the "%" column, which until that point had always read "100," now read "50." In response, Egren notified Corry Adams, a non-metals commodities buyer at Visteon, that Foamade only accepted the terms of this purchase order to the extent they were consistent with the parties' 2002 agreement. Egren stated that his response was intended to indicate his non-acceptance of the apparent reduction in the percent of business offered to Foamade as indicated by the "50%" value in the purchase order. Apparently Foamade did not receive additional purchase orders after April or May 2004 and stopped shipping air cleaners to Visteon around this time. On July 16, 2004, Egren sent an email to Adams requesting clarification of the status of the long-life air filter program. Egren did not receive a response and again emailed Adams on August 5, 2004. He reiterated his willingness to meet to resolve any problems between the parties and noted that he would take the matter up with "more senior level people at Visteon" if he did not receive a response by August 10, 2004.

*4 Adams sent the following response to Egren's email on August 5, 2004:

> Mr. Egren,
>
> I received your original email.
>
> We have already addressed your concerns and answered your questions. Visteon had worked very hard to get Foamade to meet specific needs, and felt this had not been accomplished. As a result, we took the necessary steps to switch over to a new supplier.
>
> Regards,
>
> Corry Adams

Egren sent Adams a letter on August 20, 2004, notifying Adams that Visteon breached its agreement with Foamade and submitting its claim for damages. On April 6, 2005, Foamade initiated this cause of action, alleging breach of contract and promissory estoppel claims against Visteon. On May 12, 2006, the trial court entered an order granting Visteon's MCR 2.116(C)(10) motion for summary disposition and dismissing Foamade's breach of contract and promissory estoppel claims with prejudice.

On appeal, Foamade argues that the trial court erred when it granted Visteon's motion for summary disposition, because at a minimum a question of fact existed regarding whether the parties agreed that Visteon would purchase all the air cleaners required for the long-life air filter from Foamade for the life of the program. We agree. We review de novo a trial court's decision on a motion for summary disposition. *Rose v. Nat'l Auction Group,* 466 Mich. 453, 461, 646 N.W.2d 455 (2002). A motion for summary disposition pursuant to MCR 2.116(C)(10)"tests the factual support of a claim and requires this Court to consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact warranting a trial exists."*Elezovic v. Ford Motor Co.,* 274 Mich.App. 1, 5, 731 N.W.2d 452 (2007).

Because this dispute concerns the sale of goods, the Uniform Commercial Code-Sales ("UCC"), MCL 440.2101 *et seq.,* applies. MCL 440.2102. There is no question that the parties had an agreement under which Foamade would provide supplies for the long-life air filter to Visteon. The issue in this case concerns the terms of that agreement. To make that determination, we must first ascertain what constitutes the offer and what constitutes the acceptance.

"Because the U.C.C. does not define 'offer,' courts may look to sources such as the common law and the Restatement of Contracts for the definition." 1 Williston, Sales (5th ed), § 7:10, p 282. "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude

it."*Kloian v. Domino's Pizza, LLC,* 273 Mich.App. 449, 453, 733 N.W.2d 766 (2006) (internal quotations omitted)."[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose."*Id.* at 453-454, 733 N.W.2d 766 (internal quotations omitted). In determining which document constitutes the offer and which the acceptance, "[c]ourts must often look beyond the words employed in favor of a test which examines the totality of the circumstances," especially when standardized forms are used. *Challenge Machinery Co. v. Mattison Machine Works,* 138 Mich.App. 15, 21, 359 N.W.2d 232 (1984). For example, the *Challenge Machinery* Court determined that a plaintiff's price quotation constituted an offer based on the fact that the parties had engaged in a series of negotiations for several months before the plaintiff's issuance of the final price quotation and on the fact that the defendant accepted this offer by sending the plaintiff a purchase order that was responsive to the price quotation and made specific reference to the quotation. *Id.*

*5 In this case, Foamade presented sufficient evidence to establish that Egren's letter of March 11 constituted the offer and Botero's March 12 sourcing confirmation letter constituted the acceptance, and to create a question of fact with regard to the terms of the parties' agreement. Egren's letter of March 11, 2002, contained two offers (Option 1 and Option 2). Each option listed terms that were material to the parties' agreement. In particular, each option included piece prices and tooling costs for both low-and high-volume production and provided for a price reduction after a certain numbers of parts had been shipped. Each option also contained a quantity term (specifically, that Foamade would provide Visteon with all the supplies needed to fulfill Ford's requirements for long-life air filters for the life of the program), and included estimated quantities for each year. The parties had been negotiating over these terms for months.

Visteon was aware that Foamade sought to enter into an agreement with it to provide supplies for the long-life air filter. Considering Egren's March 11 letter in context of the negotiations that preceded Foamade's proposal, this letter was an invitation to conclude negotiations between the parties by accepting either option set forth in the letter. Visteon's response also indicates that it regarded Egren's letter as an offer: Botero's March 12 email notified Foamade that Visteon had "accepted" the proposal and would send a sourcing confirmation letter shortly.

Although we are not persuaded that Botero's March 12 email alone constituted Visteon's acceptance, we find that Botero's sourcing confirmation letter, sent the same day as the email, constituted Visteon's acceptance of Option 1. In contrast to the email, which simply states that Visteon "accepted" Foamade's proposal, the letter manifests Visteon's intent to be bound by the terms of Option 1 of Foamade's offer. It congratulates Foamade on having been "selected as the supplier for the long life engine air filter program for the C170" and reiterates the key terms of Option 1, including a piece price of $7.65, tooling costs of $81,000, and required productivity of three percent annually "for the life of the program."The letter also notes, "Price reductions based on capacity investment and amortization will be in accordance with your letter dated March 11, 2002 (option # 1)." The letter assigns Foamade a program buyer and notes that Visteon's terms and conditions "will apply to this sourcing agreement and all subsequent commercial events."

Further, a genuine issue of material fact exists regarding the nature of the terms and conditions that Visteon accepted in its sourcing confirmation letter. In particular, a genuine issue of material fact exists with respect to whether Foamade offered and Visteon accepted an agreement for both low-and high-volume production "for the life of the program."Both of Foamade's proposed options in the March 11 letter included pricing for high-volume production, and nothing in Visteon's sourcing confirmation letter suggests that Visteon only accepted Foamade's proposal with respect to low-volume production. Viewed in the light most favorable to Foamade, the record supports the proposition that this was a requirements contract that accounted for the possibility that Visteon's requirements might change substantially with time and contemplated cost reductions as Visteon ordered and Foamade produced higher volumes. Notably, Foamade's March 11 letter stated, "All pricing presumes a contract for the life of the program on the Focus. We realize the volumes and project are dependent on Ford's production and plans, and that our contract is only for the volumes that Ford requires of Visteon."The letter also includes projected volumes for each year from 2003 through 2007.

*6 Further, Foamade presented evidence indicating that in the March 12 letter, Visteon accepted the first option proposed by Foamade in its March 11 letter for both low-and high-volume production. In the sourcing confirmation letter, Visteon quoted the initial price of $7 .65, which is the price listed in Egren's letter for low-volume production, but it also quoted the annual three-percent cost reduction "for the life of the program"

and a tooling cost of $81,000, which is the total of the tooling costs included in Egren's letter for both low-volume production ($21,000) and high-volume production ($60,000). Further, Adams testified that low-and high-volume production as parts of the same program, and Egren did not recall if anyone from Visteon told him that Visteon believed it was only awarding Foamade the low-volume business and not the high-volume business. Egren testified:

> [W]hen we put this [program] together, you know, we didn't know how many years the program would continue or what the volumes would be, but assuming that it did continue, that the plan was to use the opportunity the first year to produce smaller volumes to learn and refine the process, and it turned out to be a good plan because, in fact, we were able to do that.

Egren also testified that "[n]ormally what happens," and what he anticipated in this case, was that Foamade would have an opportunity to reduce costs after the first year and would approach Visteon with those cost reductions. Botero's March 12 sourcing confirmation letter suggests that eventual price reduction was a component of the parties' agreement and understanding. After reiterating the part price, tooling costs, and productivity terms included in Egren's letter, Botero wrote, "This sourcing is valid assuming that Foamade and Visteon will work together on VA/VE opportunities to further improve cost savings."Thus, sufficient evidence was presented to create a genuine issue of material fact regarding whether Foamade and Visteon entered an agreement in which Foamade would provide supplies for Visteon's long-life air filter for the life of the program, and whether this agreement encompassed both high-and low-volume production. Visteon notes that it never issued Foamade a purchase order for the high-volume production levels. However, in light of Adams' testimony that the parties anticipated that the price would change over time and there would be more than one purchase order to reflect the price changes, the absence of a purchase order for high-volume production only shows that Visteon never ordered supplies from Foamade once its requirements reached higher volumes. The absence of a purchase order does not indicate that Visteon and Foamade did not enter into an agreement regarding high-volume production; it is equally plausible that they did and Visteon breached the agreement.

Visteon argues that the purchase order that it issued on March 19, 2002, which incorporated its standard terms and conditions, was the offer and that Foamade's performance was the acceptance. Further, Visteon claims that the terms of the agreement are embodied only in the purchase orders and its standard terms and conditions. However, this understanding of the nature of the parties' agreement does not take into consideration evidence that a broader agreement existed between the parties. Specifically, Foamade presented evidence suggesting that the parties were operating according to the terms of Option 1 of the March 11, 2002, letter, which provided that the price would be reduced from $7.65 to $5.67 after 90,000 parts had been produced at low volumes. This is a reduction of $1.98, which is the same reduction reflected in the April 1, 2004, purchase order.[4]Adams testified that pursuant to the agreement between Foamade and Visteon, the price would be reduced once production reached 90,000 parts. He also admitted that this agreement was not embodied in any of the purchase orders and, thus, the entire contract between the parties was not included in the purchase orders. Accordingly, Visteon's argument that its purchase orders and standard terms and conditions constituted the entire agreement lacks merit.

*7 Visteon also incorporated its standard terms and conditions in its March 12 sourcing confirmation letter. In so doing, Visteon incorporated several "additional or different terms" in its sourcing confirmation letter, including the termination provision included as paragraph 24 of the version of Visteon's standard terms and conditions in effect at the time it sent the sourcing confirmation letter to Foamade. The termination provision provides in relevant part:

> 24. *TERMINATION*
>
> (a) Unless a Purchase Order specifically states otherwise, Buyer may terminate its purchase obligations under a Purchase Order, in whole or in part, at any time by a written notice of termination to Seller. Buyer will have such right of termination notwithstanding the existence of an Excusable Delay of Section 22.

Because Foamade's March 11 letter was the offer, and Visteon's March 12 "sourcing confirmation letter" was the acceptance, then MCL 440.2207 applies.[5]MCL 440.2207 states:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those

offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

The threshold question under MCL 440.2207(1) is whether Visteon's acceptance of Foamade's offer in its March 12 sourcing confirmation letter was "expressly made conditional" on Foamade's assent to the additional or different terms. In *Challenge Machinery, supra* at 22, 359 N.W.2d 232, this Court noted,

> At common law, the failure of the responding document to mirror the terms of the offer would have precluded the formation of a contract. The UCC, however, altered this "mirror-image" rule by providing that the inclusion of additional or different terms would not prevent the acceptance from being operative unless the acceptance was made conditional on the assent of the other party to those additional or different terms. MCL 440.2207(1).

In *Challenge Machinery,* the plaintiff issued a purchase order in response to the defendant's price quotation. The plaintiff's purchase order included the following provision: "IMPORANT: This offer consists of the terms on the front AND reverse sides hereof and buyer expressly limits acceptance to the terms hereof and no different or additional terms proposed by seller shall become part of the contract."*Id.* at 19, 359 N.W.2d 232. The *Challenge Machinery* Court determined that this purchase order contained terms that were different from those included in the defendant's price quotation. *Id.* at 22, 359 N.W.2d 232. However, this Court also noted, "The conditional assent provision has been narrowly construed to require that the acceptance must clearly reveal that the offeree is unwilling to proceed unless assured of the offeror's assent to the additional or different terms."*Id.* Because the Court found "nothing in the purchase order which illustrates [the plaintiff's] unwillingness to proceed unless it obtained the assent of the sellers," it concluded that the acceptance was not expressly conditional and thus did not preclude contract formation. *Id.*

***8** In this case, Visteon's sourcing confirmation letter contains no language that would suggest that its acceptance was conditional. The letter specifies that Visteon's terms and conditions "will apply to this sourcing agreement and all subsequent commercial events."However, the standard terms and conditions do not constitute a conditional acceptance of Foamade's offer because they do not contain language suggesting that Visteon was unwilling to proceed absent an assurance of Foamade's assent. The language of Visteon's standard terms and conditions purports to define a purchase order sent by Visteon as an offer and the seller's commencement of performance as an acceptance. Further, Visteon's standard terms and conditions provide, "Once accepted, such Purchase Order together with these terms and conditions will be the complete and exclusive statement of the purchase agreement. Any modifications proposed by Seller are not part of the agreement in the absence of Buyer's written acceptance."However, this language would not bar the formation of an agreement between the parties based on the documents exchanged. Because Foamade's March 11, 2002, letter constitutes an offer and Visteon's sourcing confirmation letter constitutes an acceptance of Option 1, this provision of Visteon's standard terms and conditions, which contemplates that Visteon's purchase order is an offer and the seller's performance is the acceptance, would not operate to make Visteon's acceptance of Foamade's March 11 offer conditional.

Foamade also argues that because Visteon's termination provision conflicted with the "life of the program" term of the offer, if a contract existed between the parties, these conflicting terms would not become part of the contract. To support its argument, Foamade claims that the trial court should have implied a term that would be reasonable under the circumstances and that a question of

fact exists regarding what constitutes reasonable duration. We disagree. Visteon's termination provision incorporates "additional or different terms" in the sourcing confirmation letter. MCL 440.2207(2) requires that "additional" terms be construed as proposals for additions to the contract and does not directly address the appropriate treatment of "different" terms. However, the *Challenge Machinery* Court determined that when the parties present different terms in their offer and acceptance, "neither provisions becomes a part of the contract and [ ] the provisions of the UCC will be given effect."*Challenge Machinery, supra* at 26, 359 N.W.2d 232.

We conclude that Visteon's termination provision is an "additional" term within the meaning of MCL 440.2207(2), rather than a "different" term that conflicts with the duration provision in Foamade's offer. Assuming that the duration term in the offer is considered to be "the life of the program," a provision giving Visteon the right to terminate the agreement at will does not conflict with this duration term. An at-will termination provision is not a duration term, but a provision giving one party the right to terminate the contract despite what would otherwise be the normal life of the contract. Thus, the parties' "duration" terms are not "different" terms; they do not cancel each other out and no question of fact is created with respect to a reasonable duration of the contract.

***9** Accordingly, we construe Visteon's termination provision as a proposal for an addition to the contract. Because the parties are merchants, this provision becomes part of the contract unless it materially alters the contract. MCL 440.2207(2)." '[M]aterial additional terms do not become part of the contract unless *expressly* agreed to by the other party.' " *Power Press Sales Co. v. MSI Battle Creek Stamping,* 238 Mich.App. 173, 182, 604 N.W.2d 772 (1999), quoting *American Parts Co. v. American Arbitration Ass'n,* 8 Mich.App. 156, 173-174, 154 N.W.2d 5 (1967) (internal quotation and citation omitted). Thus, because there is no evidence that Foamade expressly agreed to the termination provision, it would not be part of the parties' contract if it constitutes a material alteration. Comment 4 of MCL 440.2207[6] sets forth examples of clauses that "would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party":

> a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of trade allows a greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.
>
> Whether a term results in surprise or hardship is a question of fact.*American Ins. Co. v. El Paso Pipe & Supply Co.,* 978 F.2d 1185, 1190-1191 (C.A.10, 1992).[7]"Courts should first make factual findings as to whether a nonassenting party subjectively knew of an added term. It must then make findings of fact concerning whether that party should have known that such a term would be included."*Id.* at 1191.In determining whether a party was unreasonably surprised by an additional term, a variety of factors should be considered, including "a prior course of dealing and the number of written confirmations exchanged between the parties," the absence of industry custom, and "whether the addition was clearly marked on the written confirmation."*Id.* Further, "the analysis of the existence of hardship focuses on whether the clause at issue would impose substantial economic hardship on the nonassenting party."*Id.* (internal quotations and citation omitted). Thus, on remand, the trial court should determine whether Foamade was expressly aware of Visteon's incorporation of the termination provision and, if not, whether its incorporation resulted in surprise or hardship to Foamade.

Visteon also argues that Foamade's claim should be dismissed "for the separate and independent reason" that Foamade waived its claims by failing to respond to Visteon's termination of the agreement within one month, as required by Visteon's termination provision. Because questions regarding whether the termination provision was part of the parties' agreement and whether Visteon properly terminated the agreement must be decided on remand, it is better left to the trial court to address this argument.

***10** Foamade claims that if the parties' contract gave Visteon the right to terminate at will, Visteon violated its obligation under the UCC to act in good faith. Foamade argues that Visteon's decision to terminate the contract because Foamade failed to pay testing costs, which the parties agree Foamade was not required to pay, constituted a breach of its duty to act in good faith. Under MCL 440.1203, "Every contract or duty within [the UCC] imposes an obligation of good faith in its performance or enforcement."The comment to MCL 440.1203 provides in relevant part:

> This section does not support an

> independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

This comment makes clear that Foamade has no separate claim arising from Visteon's breach of the UCC's duty of good faith. However, on remand, the trial court should address Foamade's argument that Visteon breached this duty as part of Foamade's breach of contract claim.

Finally, Foamade correctly notes that the trial court confused two emails when it ruled on Visteon's motion for summary disposition. As part of its ruling on the record, the court stated:

> The e-mail from Mr. Botero, which is what the plaintiff relies on, does not state at [sic] parties had an agreement for the life of the program. It state [sic] we will review this situation following six months of production to see if such an agreement can be reached.

The court was apparently referring to an email that Botero sent to a Foamade agent on August 22, 2001, in which Botero wrote, in part:

> Visteon and Foamade agree that minimum productivity for VP3 S4U9601-AA will be 3%/year following one full year of production for the life of the program. As Visteon expects that a greater amount of cost reduction is possible (especially as capital equipment is paid off), we will review this situation following 6 months of production to see if an LTA can be approved between the companies at a higher cost reduction value above 3%/year for at least some of the contract years.

Botero's March 12, 2002, email does not contain language regarding a review of the situation after six months to see if a long-term agreement can be reached. Instead, the March 12, 2002, email reads: "FYI, the program and I have accepted this proposal and I will be sending you a sourcing confirmation letter shortly for this part."To the extent the trial court believed that Foamade was arguing that the August 21 email constituted Visteon's acceptance and based its ruling on that misunderstanding, it erred in so doing. In any event, we find that there were genuine issues of material fact making summary disposition inappropriate.

***11** We reverse the trial court's May 12, 2006, order granting Visteon's motion for summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Parallel Citations

67 UCC Rep.Serv.2d 495

Footnotes

1 Egren became CEO of Foamade in 2003.

2 "VA/VE" is "value analysis [/] value engineering," which is "a process that we use to find other ways rather that just reducing the price of a component to pull cost out of that component."

3 The parties do not indicate that a Foamade agent ever signed and returned this sourcing confirmation letter.

4 The piece price in the October 9, 2002, purchase order was $8.45. (It had increased from $7.65 because of an engineering change .) The piece price in the April 1, 2004, purchase order was reduced to $6.47. Egren noted that when he became aware of this price

reduction, he assumed that Visteon reduced the price price by $1.98 in the April 1, 2004, purchase order in conjunction with the parties' agreement that the price would be reduced by that amount once Foamade shipped 90,000 parts.

5 MCL 440.2207 is identical to UCC § 2-207.

6 "Although lacking the force of law, the official comments appended to each section of the UCC are useful aids to interpretation and construction."*Shurlow v. Bonthuis,* 456 Mich. 730, 735 n. 7, 576 N.W.2d 159 (1998).

7 Because the UCC is construed to make the law among jurisdictions uniform, it is appropriate to seek guidance from other jurisdictions in applying the provisions of the UCC. *Power Press, supra* at 180, 604 N.W.2d 772.

End of Document

TAB I

2012 WL 4356781
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

EBERSPAECHER NORTH AMERICA, INC.,
Plaintiff/Counter–Defendant,
v.
NELSON GLOBAL PRODUCTS, INC.,
Defendant/Counter–Plaintiff.

No. 12–11045. | Sept. 23, 2012.

Attorneys and Law Firms

Jason D. Killips, Rodger D. Young, Young & Associates, Farmington Hills, MI, for Plaintiff/Counter-Defendant.

James A. Rolfes, Jennifer Y. Depriest, Reed Smith LLP, Chicago, IL, Marc L. Newman, Martha J. Olijnyk, The Miller Law Firm, Rochester, MI, for Defendant/Counter-Plaintiff.

Opinion

OPINION AND ORDER DENYING PLAINTIFF'S "MOTION FOR PARTIAL SUMMARY JUDGMENT"

ROBERT H. CLELAND, District Judge.

*1 Before the court is Plaintiff Eberspaecher North America Inc.'s ("ENA's") motion for partial summary judgment on its breach-of-contract claim against Defendant Nelson Global Products Inc. ("Nelson"). The motion has been fully briefed, and the court held a motion hearing on August 15, 2012. For the reasons that follow, the court will deny the motion.

I. BACKGROUND

Plaintiff is a Tier–1 automotive supplier that provides exhaust systems to original equipment manufacturers ("OEMs") including General Motors, Mercedes, and BMW. (Montean Aff. ¶ 2, Dkt. # 11; Dougald Aff. ¶ 4, Dkt. # 15–3.) Defendant provides parts like outlet, center muffler inlet, intermediate, and tail pipes to Plaintiff for use in manufacturing its exhaust systems. (Montean Aff. ¶ 2; Dougald Aff. ¶ 4.)

The supply relationship between Plaintiff and Defendant is governed by a series of Purchase Orders executed by the parties at various times from 2008 to 2011. (Motean Aff. ¶ 2; Dougald Aff. ¶¶ 6–7; *see* Purchase Orders, Dkt. # 44 [hereinafter POs].)[1] Each Purchase Order, which incorporates by reference the 2007 or 2011 version of the "Eberspaecher North America Purchase Order Terms and Conditions," (*see* 2007 ENA Purchase Order Terms & Conditions, Dkt. # 34–2 [hereinafter 2007 ENA T & C]; 2011 ENA Purchase Order Terms & Conditions, Dkt. # 34–3 [hereinafter 2011 ENA T & C]), specifies a part number and the price Plaintiff would pay for that part, but does not contain a quantity term beyond a declaration that "[t]his Purchase Order is a Requirements Contract," (*e.g.*, PO 416019721, at 3). Once a Purchase Order was in place, Plaintiff would periodically issue releases to Defendant requesting shipment of a designated quantity of a given part on a particular date. (Montean Aff. ¶ 3; Dougald Aff. ¶ 8.) The Purchase Orders then required Plaintiff to pay Defendant in full within either 45 or 60 days of delivery. (*See, e.g.*, PO 416023006, at 1; PO 416021676, at 1.) Although several of the Purchase Orders appear open-ended as to their termination date, (*see, e.g.*, PO 416021676 (containing "[v]alidity end" date of "12/31/9999")), the Terms and Conditions state that they are valid over the life of the vehicle program for which the parts are manufactured, (*see* 2007 ENA T & C § 3; 2011 ENA T & C § 4), and Plaintiff alleges that all relevant Purchase Orders are still in effect, (Montean Aff. ¶ 4).

Sometime in 2011, Defendant realized that it was losing money on several of the parts it produces for Plaintiff. (Dougald Aff. ¶¶ 9, 13.) Defendant alleges that its losses were exacerbated by Plaintiff's repeated failure to pay invoices on time. (*Id.* ¶ 10.)On November 23, 2011, Defendant provided Plaintiff a list of price increases on twenty parts that it planned to implement on January 1, 2012. (*Id.* ¶ 16, Ex. B.) Plaintiff and Defendant discussed the issue at a meeting on January 4, 2012, but Plaintiff was not receptive to Defendant's request for a price adjustment. (*Id.* ¶ 17.)On February 13, 2012, Defendant sent Plaintiff a letter indicating that it would stop shipment of parts to Plaintiff on April 1, 2012, unless Plaintiff agreed to the price increase. (2/3/12 Letter, Dkt. # 8–7.)

*2 Plaintiff initiated this suit on March 8, 2012, claiming that Defendant's letter constituted an anticipatory breach

of contract and seeking an injunction requiring Defendant to continue supplying parts at the prices stated in the Purchase Orders. The court granted Plaintiff's request for a preliminary injunction preventing Defendant from stopping parts shipments, ordering that Plaintiff pay Defendant in accordance with the Purchase Orders, but requiring Plaintiff to fund an escrow account with the additional amount that would be owed for parts delivered if Defendant's proposed price increases were in effect. Plaintiff then filed the instant motion for partial summary judgment as to Defendant's liability on the breach-of-contract claim.

II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a). When deciding a motion for summary judgment, the court "is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " *Sagan v. United States,* 342 F.3d 493, 497 (6th Cir.2003) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Id.* at 497 (quoting *Anderson,* 477 U.S. at 251–52). "The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [movant] is entitled to a verdict .... " *Anderson,* 477 U.S. at 252.

The party seeking summary judgment has the initial burden of showing the absence of a genuine dispute as to a material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmovant, who "must set forth specific facts showing that there is a genuine issue for trial."*Anderson,* 477 U.S. at 256. It is not enough for the nonmovant to "simply show that there is some metaphysical doubt as to the material facts."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Rather, the nonmovant must sufficiently allege a fact that, if proven, "would have [the] effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties."*Midwest Media Prop. L.L.C. v. Symmes Twp., Ohio,* 503 F.3d 456, 469 (6th Cir.2007) (alteration in original) (quoting *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir.1984)) (internal quotation marks omitted).

Both parties must support their assertions "that a fact cannot be or is genuinely disputed" by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials."Fed.R.Civ.P. 56(c)(1)(A). Alternatively, either party may carry its burden by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."*Id.* 56(c) (1)(B)."The court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor."*Sagan,* 342 F.3d at 497 (citing *Matsushita,* 475 U.S. at 587).

III. DISCUSSION

*3 In its motion, Plaintiff asks the court to hold that the relevant Purchase Orders are valid, enforceable contracts, and Defendant's refusal to ship parts at the prices designated therein constitutes breach. Defendant attempts to refute the first of these assertions by contending that the Purchase Orders: (1) contain no enforceable quantity term; and (2) lack mutuality of obligation because Plaintiff could terminate them at any time and for any reason. Defendant also avers that, even if the Purchase Orders are valid contracts: (3) the Purchase Orders are for an indefinite duration and thus terminable at will; and (4) Defendant is excused from performance due to Plaintiff's prior breach. The court considers each of Defendant's arguments in turn.

A. Statute of Frauds

The bulk of the parties' briefs address whether the Purchase Orders, in conjunction with the Terms and Conditions, obligate Plaintiff to issue releases to Defendant in accordance with its requirements for parts. If so, as Plaintiff argues, the Purchase Orders are enforceable requirements contracts under which Plaintiff must order and Defendant must supply Plaintiff's "actual ... requirements as may occur in good faith" under the terms and for the duration of the contracts. Mich. Comp. Laws § 440.2306. However, Defendant asserts that,

because neither the Purchase Orders nor the Terms and Conditions contain a promise by Plaintiff " 'to obtain his required goods or services exclusively from the seller,' " they are not true requirements contracts. *Acemco, Inc. v. Olympic Steel Lafayette, Inc.*, No. 256638, 2005 WL 2810716, at *8 (Mich.Ct.App. Oct.27, 2005) (unpublished per curiam opinion) (quoting *Propane Indus., Inc. v. Gen. Motors Corp.*, 429 F.Supp. 214, 218 (W.D.Mo.1977)). Should this interpretation prevail, Defendant avers that it has no obligation to provide parts unless and until it receives and accepts a release requesting shipment of a specific quantity.

Defendant characterizes this dispute as a question of whether the Purchase Orders satisfy the statute of frauds, which does not allow for the enforcement of a contract for the sale of $1000 or more of goods beyond the quantity shown in a "writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought."Mich. Comp. Laws § 440.2201(1). Thus, the court must begin by looking to language of the Purchase Orders and the Terms and Conditions to determine whether they contain a valid quantity term.

All but one of the Purchase Orders state "[t]his Purchase Order is a Requirements Contract."The Terms and Conditions further explain the meaning of this provision:

> [T]his Order is a requirements contract under which Seller is required to supply Buyer's requirements which shall be defined as those quantities ordered by Buyer from time to time, as evidenced by written releases issued by the Buyer from time to time, but not exceeding 20% (or such other quoted amount provided to seller) above the quoted volume/capacity requirements provided to Seller. Buyer's requirements under this Order are determined by the needs of Buyer's customers and such needs may change from time-to-time. Any projected or estimated volumes provided by Buyer to Seller (including forecasted volumes in any requests for quotation) in connection with this Order are for planning purposes only and do not constitute a commitment or obligation to purchase a specified quantity.

*4 (2007 ENA T & C § 2(c); *accord* 2011 ENA T & C § 2(c).) Additionally, the Terms and Conditions provide:

> Buyer will have no obligation or liability for Seller's production arrangements beyond the quantity required by, or in advance of the time required by Buyer's delivery schedule. If this Order specifies that deliveries are to be made in accordance with Buyer's releases, Seller will neither produce any Goods, nor procure raw materials, nor ship any Goods, except to the extent authorized by Buyer's written releases. Quantities noted in this Order as "planning" or with words of similar meaning are for Seller's planning purposes only and do not constitute a commitment by Buyer to purchase such quantities.

(2007 ENA T & C § 2(b); *accord* 2011 ENA T & C § 2(b).)

Plaintiff alleges that the Purchase Orders' and Terms and Conditions' designation of the parties' agreement as a "requirements contract" is sufficient to create the requisite obligation to purchase from Defendant its "actual ... requirements as may occur in good faith."Mich. Comp. Laws § 440.2306. On this view, the references to releases in the Terms and Conditions simply specify the method by which Plaintiff would communicate its requirements to Defendant. *See Metal Partners, LLC v. L & W Corp.*, No. 06–14799, 2009 WL 3271266, at *6 (E.D.Mich. Oct.13, 2009) (finding enforceable a supply agreement under which supplier agreed "it will sell and deliver" steel "to meet Buyer's requirements for the steel in quantities as communicated from time to time by buyers in purchase orders and/or material releases"). Plaintiff maintains that this interpretation is bolstered by the Terms and Conditions' statement that "Buyer's requirements under this Order are determined by the needs of Buyer's customers," (2007 ENA T & C § 2(c); *accord* 2011 ENA T & C § 2(c)), which implies that Plaintiff intended to purchase from Defendant the number of parts necessary to fulfill orders from its customers.[2]

Defendant, on the other hand, does not consider dispositive the fact that the label "requirements contract" is affixed to the Purchase Orders. *See Ralph Const., Inc. v. United States*, 4 Cl.Ct. 727, 731 (1984) (noting that,

"[n]otwithstanding that the contract says, 'This is a requirements contract ... [,]" court is not bound to so interpret it if "it contains none of the elements necessary to that result"); *Propane Indus.*, 429 F.Supp. at 219–20 ("A promise to purchase exclusively from plaintiff cannot be implied solely from use of the terms 'requirement' and 'as required' because 'requirement' can mean either 'all needed by defendant for the Fairfax plant' or only 'all desired by defendant from plaintiff.'The word 'requirements' is not a word of art having the meaning attributed to it by the defendant."(internal quotation marks and alterations omitted)). Rather, Defendant emphasizes that the Terms and Conditions "define[ ] [Buyer's requirements] as those quantities ordered by Buyer from time to time, as evidenced by written releases issued by the Buyer from time to time."(2007 ENA T & C § 2(c); 2011 ENA T & C § 2(c).) Since they confine Plaintiff's obligation to purchase parts to only those quantities ordered in subsequent releases, Defendant contends, the Purchase Orders themselves contain no enforceable quantity and thus fail as contracts.

*5 Defendant's argument notwithstanding, the repeated references to Plaintiff's "requirements" in the Purchase Orders and Terms and Conditions is sufficient to satisfy the statute of frauds. Under Michigan law, a quantity term must appear in writing in order to satisfy the statute of frauds, *Lorenz Supply Co. v. Am. Standard, Inc.*, 419 Mich. 610, 358 N.W.2d 845, 846–47 (Mich.1984), but "[o]nce a quantity term is found to exist in the agreement, the agreement need not fail because the quantity term is not precise,"*Gest v. Frost* (*In re Estate of Frost*), 130 Mich.App. 556, 344 N.W.2d 331, 334 (Mich.Ct.App.1983). If a quantity term is sufficient to satisfy the purpose of the statute of frauds—to ensure that the parties did in fact have an agreement—then parol evidence may be adduced to explain or complete that term. *Id.*

Granted, the Michigan Court of Appeals has applied this principle with mixed, and sometimes contradictory, results. *Compare Great N. Packaging, Inc. v. Gen. Tire & Rubber Co.*, 154 Mich.App. 777, 399 N.W.2d 408, 413 (Mich.Ct.App.1986) ("[T]he term 'blanket order' expresses a quantity term, albeit an imprecise one."), *and Frost*, 344 N.W.2d at 332 (determining that contract for sale of "all wood sawable" on parcel of land contained sufficient quantity term), *with Acemco*, 2005 WL 2810716, at *1 (invalidating under state of frauds a writing that stated "[d]uring the term of this Agreement, the Seller agrees to sell to the Buyer such quantities of the Products as the Buyer may specify in its purchase orders, which the Buyer may deliver at its discretion."), *and Dedoes Indus., Inc. v. Target Steel, Inc.*, No. 254413, 2005 WL 1224700, at *2 (finding no valid quantity term in price quote stating that supplier "would satisfy [buyer's] steel needs" for three years), *and Ace Concrete Prods. Co. v. Charles J. Rogers Constr. Co.*, 69 Mich.App. 610, 245 N.W.2d 353, 354 (Mich.Ct.App.1976) (holding that statute of frauds not satisfied by writing that referenced specific construction contract and contained "price quote on concrete for the above job").

However, in none of the cases finding the lack of an enforceable quantity term did the contract explicitly require the seller "to supply Buyer's requirements," as the Terms and Conditions do here. (2007 ENA T & C § 2(c); *accord* 2011 ENA T & C § 2(c).) The UCC is clear that "a contract for output or requirements is not too indefinite,"Mich. Comp. Laws § 440.2306 cmt. n. 2, and "[a] requirements or output term of a contract, although general in language, nonetheless is, *if stated in the writing*, specific as to quantity, and in compliance with § 2–201,"*Lorenz Supply*, 358 N.W.2d at 847. The Terms and Conditions clearly contain a quantity term of "Buyer's requirements," and this is precise enough to satisfy the statute of frauds. *Accord Johnson Controls, Inc. v. TRW Vehicle Safety Sys., Inc.*, 491 F.Supp.2d 707, 716 (E.D.Mich.2007) (finding reasoning of cases like *Great Northern* and *Frost* better reconcile "the statute of frauds' purpose to provide a basis for believing a contract exists" with "the UCC's other substantive goals of liberally incorporating trade usage, custom and practice, course of dealing, and course of performance into parties' agreements in fact" than cases like *Ace Concrete, Acemco,* and *Dedoes*).

B. Mutuality of Obligation

*6 Just because the Purchase Orders satisfy the statute of frauds, however, does not necessarily mean they are enforceable contracts. For while the writing may be adequate to confirm an agreement exists, that agreement could still fail for lack of consideration if, as Defendant urges, it does not obligate Plaintiff to buy its good-faith requirements from Defendant.

The textual argument Defendant advances in support of its position has found some purchase in this circuit, primarily based upon the Sixth Circuit's unpublished opinion in *Advanced Plastics Corp. v. White Consolidated Industries, Inc.*, 47 F.3d 1167 (6th Cir.1995) (unpublished table decision). There, the court of appeals decided that, under Michigan law, the parties' blanket purchase order was not a requirements contract when it stated that "Seller

agrees to furnish Buyer's requirements for the goods or services covered by this Purchase Order *to the extent of and in accordance with*... Buyer's written instructions."*Id.* at *2. This term, when considered alongside language that "Buyer shall have no obligation to honor invoices for goods or services fabricated, rendered, or delivered other than according to the ... written instructions of Buyer" and "Buyer shall be entitled to make other purchases at its discretion in order to assure its production operations and maintain reasonable alternative sources of supply," led the court of appeals to conclude that the blanket purchase order "clearly demonstrates that the parties intended for [the buyer] to purchase quantities of parts only according to its releases, and not according to its requirements."*Id.* Several district courts in this circuit have read this holding to foreclose the possibility that supply arrangements like that laid out in the Purchase Orders is not premised on a requirements contract. *See Aleris Aluminum Can. L.P. v. Valeo, Inc.*, 718 F.Supp.2d 825, 832–33 (E.D.Mich.2010); *Harris Thomas Indus., Inc. v. ZF Lemforder Corp.*, No. 3:06CV190, 2007 WL 3071676, at *3 (S.D.Ohio Oct.19, 2007).[3]

So, *Advanced Plastics* and its progeny reveal that there may be some uncertainty as to Plaintiff's obligations under the Terms and Conditions of the Purchase Orders, despite their reference to "Buyer's requirements." Fortunately, the UCC's parol evidence rule allows the Terms and Conditions to be "explained or supplemented" by "course of dealing or usage of trade" or by "course of performance." Mich. Comp. Laws § 440.2202. Normally, the court may not take parol evidence into account absent a determination that the parties' written contract is ambiguous. This finding is not, however, a condition precedent to the consideration of course-of-dealing, usage-oftrade, and course-of-performance evidence under the UCC. Mich. Comp. Laws § 440.2202 cmt. n. 1(c). Such evidence may be helpful in clarifying what is meant by the juxtaposition of the otherwise clear references to "Buyer's requirements" with a definition of requirements as "those quantities ordered by Buyer from time to time."(2007 ENA T & C § 2(c); 2011 ENA T & C § 2(c).) *See Metal One Am., Inc. v. Ctr. Mfg. ., Inc.*, No. 1:04–CV–431, 2005 WL 1657128, at *5 (W.D.Mich. July 14, 2005) (finding course of performance established parties had requirements contract).

*7 It appears from the record on summary judgment that both parties have courseof-dealing, usage-of-trade, and course-of-performance evidence favorable to their interpretations. Statements in the affidavit of Plaintiff's representative John Montean suggests that Plaintiff would be able to prove that it procured its parts requirements exclusively from Defendant, which would tend to support the view that the parties had a requirements contract.[4](*See* Montean Aff. ¶ 7 ("It would require a minimum of approximately 20 weeks for ENA to find an alternative supplier.").) For its part, Defendant offers other comments made by Montean during his deposition tending to support their reading of the Terms and Conditions. (*See, e.g.*, Montean Dep. 16:23–17:3, Mar. 31, 2012, Dkt. # 38–3 ("A requirements contract is basically a contract that is for requirements that are sent out to the vendors. This is an automotive term used by automotive vendors. It's basically not a set requirement of parts to be shipped to, and it's based on releases sent out to the supplier.").) As the resolution of this issue is a fact question, summary judgment as to the enforceability of the Purchase Orders cannot be granted to either party.[5]

C. Duration of the Purchase Orders

Defendant also attempts to win the day by portraying the Purchase Orders as contracts of indefinite duration that it was allowed to terminate at any time upon reasonable notice. *See*Mich. Comp. Laws § 440.2309 ("Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party."). This contention is squarely foreclosed by the Terms and Conditions, which prohibit Defendant from terminating a Purchase Order during the life of the OEM vehicle program for which the subject part is used:

> [T]he term of this Order (the "Term") commences on the date set forth on the Order and continues through the end of the vehicle platform(s) for which such boods are supplied, including any extensions thereof. Seller agrees that it will not terminate this order before the end of the vehicle platform.

(2007 ENA T & C § 3; *accord* 2011 ENA T & C § 4.) Even if, as Defendant argues, a contract for the life of a part or program is of indefinite duration, the parties "otherwise agreed" under section 440.2309 to limit Defendant's right to terminate the Purchase Orders during that time frame. Defendant cites no legal authority or factual circumstance that would allow it to supercede this clear contractual directive.

D. Plaintiff's Material Breach

Finally, Defendant avers that it should be excused from performance because Plaintiff has materially breached the purchase orders by failing to pay invoices on time. Defendant alleges that "[o]f the nearly *1600* invoices issued for the parts at issue and that have become due, ENA has paid only one on time, even after repeated Nelson complaints," (Def.'s Resp. 17 (record citation omitted)); *see* Whipp Decl. Ex. A., Dkt. # 38–4), and nearly 40% of Defendant's account receivables from Plaintiff from August 1, 2011, through March 28, 2012, were more than thirty days past due, (Dougald Aff. ¶ 10). According to Defendant, these chronic late payments have increased "both the financing and administrative costs associated with supplying ENA."(*Id.* ¶ 11.)When questioned about these allegations, Plaintiff's representative indicated that at least some of these delays could be explained by Defendant's failure to format its invoices in accordance with Plaintiff's billing specifications. (*See* Thumlert Dep. 7:4–24, 14:6–15:22, Mar. 31, 2012, Dkt. # 38–6.)

***8** Defendant is correct that the party "who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform."*Ehlinger v. Bodi Lake Lumber Co.*, 324 Mich. 77, 36 N.W.2d 311, 316 (Mich.1949) (internal quotation marks omitted). While a "complete failure of consideration" may excuse performance, *McCarty v. Mercury Metalcraft Co.*, 372 Mich. 567, 127 N.W.2d 340, 343 (Mich.1964), the late payment, or even non-payment, of some invoices normally would not excuse Defendant from its obligation to perform the contract, as any such breach would not "effect[ ] such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible,"*id.; see Coupled Prods. LLC v. Component Bar Prods., Inc.*, No. 09–12081, 2012 WL 954646, at *3 (E.D.Mich. Mar.21, 2012) ("Courts have held that failure to timely meet payment does not constitute a substantial breach."(citing *Baith v. Knapp–Stiles, Inc.*, 380 Mich. 119, 156 N.W.2d 575 (Mich.1968))). Here, however, Defendant has presented evidence that Plaintiff's late payment has been a pervasive and chronic problem. Under these circumstances, Defendant has created a genuine issue of material fact as to whether Plaintiff committed a prior substantial breach, which also makes summary judgment as to liability inappropriate.

IV. CONCLUSION

For the foregoing reasons, it is ordered that Plaintiff's "Motion for Partial Summary Judgment" [Dkt. # 36] is DENIED.

Parallel Citations

78 UCC Rep.Serv.2d 771

Footnotes

1 At oral argument, Plaintiff confirmed that it has moved for summary judgment as to all of the Purchase Orders that remain at issue in this case, which are contained in its Corrected Exhibit 1, docketed as ECF number 44. (*See* Pl.'s Reply Supp. Mot. Partial Summ. J. 5 n. 6, Dkt. # 45.) The court cites individual purchase orders by the "Purchase Order Number" appearing at the upper right corner on the first page of each Purchase Order.

2 Defendant takes issue with Plaintiff's purported reliance on the needs of its OEM customers, presenting data that it claims shows Plaintiff has ordered at least some parts in numbers that exceed its customer's demand. (*See* Dougald Decl. ¶¶ 4–8, Ex. A, Dkt. # 38–2.) If true, this allegation would support a claim that Plaintiff breached the Purchase Orders by not ordering its good-faith requirements in accordance with section 440.2306, not an argument that the Purchase Orders are themselves invalid contracts. Moreover, courts considering such claims based on a buyer's request for goods exceeding its requirements have held that a contract is enforceable *up to* a buyer's actual requirements. *See, e.g., Mass. Gas & Elec. Light Supply Corp. v. V–M Corp.*, 387 F.2d 605, 607 (1st Cir.1967). This premise is unhelpful to Defendant's claim that it should not be required to supply *any* of Plaintiff's requirements.

3 Defendant's citation of and reliance on *Johnson Electric North America v. CRH North America, Inc.*, No. 10–13184, 2011 WL 6016527 (Dec. 2, 2011), in this context and others, is inappropriate, as that opinion has been vacated, *see Johnson Elec. N. Am., Inc. v. CRH N. Am., Inc.*, No. 2:1 0–cv–13184–VAR–MKM (E.D.Mich. Mar. 9, 2012) (stipulated order vacating judgment). The court does not consider it viable authority.

4 Plaintiff correctly points out that Michigan law is unclear as to whether exclusivity is a mandatory characteristic of a binding requirements contract. *See GRM Corp. v. Miniature Precision Components, Inc.*, No. 06–15231–BC, 2008 WL 82224, at *6

(E.D.Mich. Jan.8, 2008) (comparing *Acemco,* 2005 WL 2810716, at *8 (citing definition of requirements contract mandating exclusivity), with *Plastech Eng'g Prods. v. Grand Haven Plastics, Inc.,* No. 252532, 2005 WL 736519, at *7 (Mich.Ct.App.2005) (unpublished per curiam decision) (stating section 440.2306 applies to both exclusive and nonexclusive requirements contracts)). Nevertheless, exclusivity could be a factor in determining whether a requirements contract exists.

5 Defendant also argues that the Purchase Orders lack mutuality because Plaintiff has the unilateral right to terminate them at any time and for any reason, even when there are releases pending with Defendant. (*See* 2007 ENA T & C §§ 11, 32; 2011 ENA T & C §§ 12, 34.) Yet, Defendant simply offers no support for its contention that a termination-for-convenience clause evinces a lack of consideration, provided that the parties had an otherwise enforceable requirements contract. *See Aleris,* 718 F.Supp.2d at 827 (holding contract invalid due to lack of quantity term without reference to buyer's unilateral termination rights). Confusingly, Defendant cites in its response several cases in which a court *upheld* a buyer's exercise of its termination rights under such clauses. *See In re Dana Corp.,* No. 06–10354(BRL), 2007 WL 4105714, at *3 (Bankr.S.D.N.Y. Nov.14, 2007); *Q.C. Onics Ventures, LP v. Johnson Controls, Inc.,* No. 1–04–CV–138–TS, 2006 WL 1722365, at *7–10 (N.D.Ind. June 21, 2006). These decisions have no bearing on this case, where Defendant does not claim—nor do the parties' agreements contain—its own right to terminate the Purchase Orders for its convenience.

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TAB J

2006 WL 3734126
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

ROLL-ICE INTERNATIONAL, LLC, Robert J. Bordeaux, Victor S. Posa, and Paul M. Steinhauser, Jr., Plaintiffs-Appellants,
v.
V-FORMATION, INC., Defendant-Appellee.

Docket No. 264806. | Dec. 19, 2006.

Saginaw Circuit Court; LC No. 04-052945-CB.

Before: MURPHY, P.J., and SMOLENSKI and KELLY, JJ.

Opinion

PER CURIAM.

*1 Plaintiffs appeal as of right the judgment relative to the amount of damages awarded to them by the trial court following defendant's default. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs and defendant entered into a licensing agreement for several of plaintiffs' patents. The contract provided that defendant would make minimum quarterly royalty payments of $15,000 per quarter to plaintiffs for the life of the patents. In July 2003, defendant failed to make a quarterly payment. Plaintiffs sent a letter to defendant on September 25, 2003, advising defendant that, pursuant to the contract, plaintiffs were giving formal notice of their intent to terminate the contract unless defendant cured the defect within 90 days. Defendant did not cure the defect by making the quarterly payment, and the contract was terminated.

Plaintiffs filed an action for breach of contract. Defendant failed to plead or otherwise defend the lawsuit, and the trial court entered a default against defendant. Defendant's trial counsel then filed an appearance and a motion to set aside the default. The trial court denied defendant's motion to set aside the default, and ordered a hearing on damages.

At the damages hearing, plaintiffs argued they were entitled to $639,195-the minimum amount of royalties due until the last patent expired. Defendant argued that plaintiffs were entitled only to $30,000-the outstanding quarterly payments due at the time of the breach and subsequent termination of the contract by plaintiffs.

The trial court concluded that plaintiffs were entitled to $45,000 plus interests and costs because defendant failed to make payments during the second and third quarters of 2003, and the contract terminated only six days before the end of the fourth quarter.

This Court reviews a trial court's award of damages after a bench trial for clear error. *Scott v. Allen Bradley Co,* 139 Mich.App 665, 672; 362 NW2d 734 (1984)."A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."*Gumma v. D & T Constr Co,* 235 Mich.App 210, 221; 597 NW2d 207 (1999).

The trial court did not clearly err in finding that plaintiffs were only entitled to damages in the amount of the outstanding royalties payments due at the time of the termination of the contract.

The rights and duties of parties to a contract are derived from the terms of the agreement, and unambiguous contracts must be enforced as written. *Rory v. Continental Ins Co,* 473 Mich. 457, 468; 703 NW2d 23 (2005). The general rule of contract law is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Id.* Under this legal principle, the parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority of the courts to interfere with the parties' agreement. *St. Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n,* 458 Mich. 540, 570-572; 581 NW2d 707 (1998). Here, the parties had a valid contract, but plaintiffs chose to terminate it. Thus, at the time of the termination, plaintiffs' damages ceased to accrue. Once the contract was no longer in force, the parties no longer owed one another the rights and duties outlined in the contract.

*2 Further, claims on an installment contract do not ordinarily accrue until the installment becomes due in the absence of an acceleration clause in the contract. *Petovello v. Murray,* 139 Mich.App 639, 645; 362 NW2d 857 (1984), citing MCL 600.5836 of the RJA ("The

claims on an installment contract accrue as each installment falls due."). The contract in this case did not contain an acceleration clause. An unambiguous contract must be enforced according to its terms. *Hamade v. Sunoco, Inc (R & M),* 271 Mich.App 145, 166; 721 NW2d 233 (2006).

Plaintiffs also contend that defendant anticipatorily breached its obligation to make future payments under the contract. Ordinarily, the courts lack authority "to decree the entire amount due in the absence of an acceleration clause in the contract."*Lutz v. Dutmer,* 286 Mich. 467, 488; 282 NW 431 (1938); *Benincasa v. Mihailovich,* 31 Mich.App 473, 478; 188 NW2d 136 (1971). However, under the doctrine of anticipatory breach, if, prior to the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for breach of the contract or wait until performance is due under the contract.*Stoddard v. Manufacturers Nat'l Bank of Grand Rapids,* 234 Mich.App 140, 163; 593 NW2d 630 (1999). A party's intention, as manifested by acts and words, controls whether an anticipatory breach has occurred. *Paul v. Bogle,* 193 Mich.App 479, 493-494; 484 NW2d 728 (1992).

Here, defendant performed under the contract for three years until the breach, when it failed to make two royalties payments. Plaintiff Victor Posa testified at the damages hearing that when he inquired about defendant's failure to make payment, defendant told him that the payment was forthcoming. Defendant did not otherwise communicate with plaintiffs about whether it intended to breach the contract before plaintiffs sent defendant the letter advising that they were terminating the contract. Thus, the trial court did not clearly err in concluding that there is no factual support for plaintiffs' assertion of anticipatory breach.

In sum, the trial court did not err in awarding plaintiffs the amount of the outstanding royalties payments due at the time of the termination of the contract and in declining to award plaintiffs the minimum amount of royalties due until the last patent expired.

Affirmed.

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TAB K

2003 WL 1985257
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Yogeschandra B. PATEL, M.D.,
Plaintiff-Appellee/Cross-Appellant,
v.
WYANDOTTE HOSPITAL AND MEDICAL CENTER, INC., d/b/a Henry Ford Wyandotte Hospital and Dr. Andrew R. Barnosky,
Defendants-Appellants/Cross-Appellees.

No. 230189. | April 29, 2003.

Before: O'CONNELL, P.J., and FITZGERALD and MURRAY, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 Defendant appeals as of right, and plaintiff cross-appeals, a directed verdict in favor of plaintiff on a claim of breach of contract and a jury verdict in favor of plaintiff on claims of employment discrimination. We affirm in part, reverse in part, and remand for a new trial.

I. Basic Facts and Procedural History

Plaintiff, an emergency room physician at defendant Henry Ford Wyandotte Hospital, was terminated from his employment following an internal investigation initiated by the hospital after it received a patient complaint on April 20, 1996, alleging that plaintiff had conducted an inappropriate examination of the patient's breasts and abdominal area when she came to the emergency room. Following the termination, plaintiff filed suit against the hospital and its then Director of Emergency Services, defendant Dr. Andrew R. Barnosky. In his complaint, plaintiff alleged that he entered into an employment contract with the hospital on June 15, 1989, and that the hospital wrongfully terminated the contract. Count I of the complaint alleged that the termination of plaintiff's employment constituted a breach of contract, and counts II and III alleged national origin and religious discrimination in violation of the Elliot-Larsen Civil Rights Act, M.C.L. § 37.2101 *et seq.* Count IV complained of alleged misrepresentations during the investigatory period, and Count V alleged that defendant Barnosky tortiously interfered with plaintiff's contractual relationship with the hospital when he wrongfully terminated the employment contract.

Defendants moved for partial summary disposition, asserting that they were entitled to a dismissal of the claims of national origin and religious discrimination because plaintiff could not establish a prima facie case of discrimination and that, even if he could, there was a legitimate nondiscriminatory basis for the termination. The motion also sought dismissal of the claims of misrepresentation and tortious interference with contractual relations. In response, plaintiff maintained that he relied on "direct evidence" of national origin/religious discrimination and that he was able to prove a prima facie case of intentional discrimination. He also claimed that there was a genuine issue of material fact regarding alleged misrepresentation. Plaintiff did not address the claim of tortious interference.

At a hearing on the motion on August 13, 1999, plaintiff agreed to dismiss the claim of tortious interference. On November 16, 1999, the trial court issued an opinion granting summary disposition on the claims of misrepresentation and tortious interference but denying summary disposition on the discrimination claims. With regard to the plaintiff's "direct evidence" claims, the court held that the evidence was not overwhelming, but was sufficient to create a question of fact.

On April 14, 2000, plaintiff filed a motion seeking to exclude from evidence a report prepared by Joan Valentine, the hospital's risk manager, following her review of plaintiff's "trend file"[1] as well as several hundred patient charts. Plaintiff argued that the report should be excluded because it was compiled as a result of a review of patient records and therefore violated the physician-patient privilege. A hearing was held on the motion on April 21, 2000, and the court declined to rule on the motion at that time.

*2 On May 4, 2000, a pretrial hearing was held on several motions in limine, including defendants' motion to limit plaintiff's contract damages to a period not exceeding 180 days. The court indicated its inclination to limit the

contract damages, but took the motion under advisement. At this hearing the parties also discussed the deposition testimony of Dr. Cathy Frank, the psychiatrist to whom plaintiff was referred following the April 20, 1996, complaint. Plaintiff's counsel indicated that he had some objections regarding the testimony elicited during the deposition that would have to be discussed before the deposition was played to the jury. Additional argument regarding plaintiff's motion to exclude the Valentine report from evidence was also presented. The court indicated that some portions of the report would be admitted, and that it would supply additional clarification before commencement of trial.

Trial commenced on May 8, 2000. Before jury selection, the trial court made rulings on the motions that it had taken under advisement. With regard to the motion to limit contract damages, the court indicated that it would consider the issue and make a ruling the following day. On May 9, the court granted summary disposition limiting the contract damages. In light of this ruling, defense counsel indicated that the hospital was prepared to pay for the alleged breach of contract and that no evidence concerning the contract breach should be admitted into evidence. However, plaintiff's counsel objected to the timing of the removal of the contract claim and indicated his intent to also seek recovery of consequential damages premised on the breach of contract. Thus, the trial court allowed the contract claim to proceed to trial.

With regard to plaintiff's motion to exclude the Valentine report, the court ruled that some of the report would be admitted, but that some portions were to be redacted. The issue continued to be discussed throughout the trial.

The facts concerning plaintiff's period of employment at the hospital and his termination were introduced through the testimony of several witnesses. Barnosky hired plaintiff in June 1985. As department supervisor, Barnosky was apprised of complaints concerning the physicians in the emergency room. On prior occasions, patients had complained that plaintiff had performed an improper act during the course of a pelvic examination. Barnosky spoke to plaintiff about the complaints and discussed with plaintiff the hospital policy concerning the examination of females. He explained to plaintiff that it was hospital policy to have another person present during a pelvic examination, preferably a registered nurse, who should be in a position to view the procedure. Although there was no policy regarding a chaperone at that time for breast examinations, Barnosky advised plaintiff that he should have a chaperone present when performing a breast exam. The complaints were memorialized in memos placed in plaintiff's trend file.

*3 On the morning of Saturday, April 20, 1996, Barnosky received a telephone call at home from Valentine regarding a verbal complaint of sexual impropriety made against the plaintiff the night before by a patient. Barnosky met with Valentine at the hospital and they contacted the patient by telephone to discuss the incident. The patient repeated the allegations as they appeared in the written complaint. Barnosky believed that the patient sounded logical and decided that her complaint needed to be investigated.

Barnosky and Valentine met with plaintiff when he arrived for work that morning. During that meeting plaintiff was advised of the patient complaint. Plaintiff denied any impropriety, but admitted that there was no female chaperone present when he examined the patient. At the conclusion of the meeting, plaintiff was placed on administrative leave with pay pending an investigation. Barnosky told plaintiff that there would be an investigation and that he was hopeful that plaintiff would be able to return to work the following Tuesday. Plaintiff was told that he needed to see a psychiatrist for a "fitness to work" evaluation because of the seriousness of the allegations.

After plaintiff left the meeting, Barnosky and Valentine discussed the previous complaints that Barnosky had received. Barnosky, Valentine, Robert Riney (the hospital's vice-president of human resources), and Dr. Schultz (the chief and vice-president of medical affairs) agreed that Valentine should look at plaintiff's trend file and conduct a review of patient charts to gather data necessary for the investigation into plaintiff's practices to see if there was a pattern of conduct.

Valentine conducted a data review of plaintiff's trend file and a review of the emergency room records of various doctors. Her redacted May 6, 1996, report was admitted into evidence. Defendant objected to the redaction of the report because the report, without redactions, was what was available to hospital personnel during the decision-making process.

In her report, Valentine set forth the results of her examination of emergency room records in which she compared the treatment given by Dr. Patel to that provided by the other emergency room physicians for similar initial diagnoses. Valentine was concerned with female patients between the ages of eighteen and forty whose discharge summaries indicated diagnoses of abdominal complaints, urinary tract infections (UTI), pelvic inflammatory disease (PID), or any combination of these diagnoses. She randomly selected two months of

records for each of the years 1991, 1992, 1994, and 1995. For each record, Valentine reviewed the documentation, including the nurses' notes from triage and in the emergency room, and compared these nursing notes with the history taken by the physician. She also reviewed the treatment given and the laboratory results.

Valentine testified that she also pulled records for Drs. Barnosky, Davis, Gardner, Hartman, and Isaac for review. She reviewed 285 charts and found approximately fifty-five total records of Dr. Patel in which inconsistencies between diagnosis and treatment were identified. She did not notice such inconsistencies in the records of the other physicians. Valentine testified that she noted that plaintiff seemed to perform more pelvic exams than other physicians when presented with similar information, and that his treatment was often inconsistent with the nursing notes and laboratory results. When Valentine asked plaintiff about the inconsistencies, his explanation was that "the nurses were lazy and not taking histories for his patients."

*4 In her report, Valentine expressed concern about the incident and the complaints that had been received about plaintiff's examinations. She also expressed concern about plaintiff's reaction at the meeting with Barnosky, where he did not appear to appreciate the implications of conducting certain examinations without a female chaperone even though this issue had been previously discussed with him.

Psychiatrist Cathy Frank performed the fitness to work evaluation and prepared a written report. Under the first heading, "History of Presenting Illness," plaintiff was identified as "a 54-year old Indian physician who has been employed at Henry Ford Wyandotte Hospital for approximately five years and as an Emergency Room physician for the past fourteen years."Dr. Frank detailed the history given to her by plaintiff concerning his examination of the patient, as well as the prior complaint from a pregnant patient who complained that he had touched her clitoris during an examination.

Under the fourth heading, "Psychosocial History," Dr. Frank's report noted that plaintiff "was born and raised in India."According to the report, plaintiff described his mother as a strict woman and a devout Hindu, and his father as also very religious. He described his marriage as a happy one, and told Dr. Frank that he and his wife had three children. The report also stated "He denies any sexual problems in the marriage. He denies any history of sexual perversion or fetish. He stressed that as he is from a Hindu culture, in which there are prohibitions against touching females and this was something he had to overcome in his training and personal life."

Under the heading "Mental Status Exam," Dr. Frank described plaintiff and his mental status, and concluded:

> I have though three major concerns regarding this physician. The first is the fact that at the very least, he used poor judgment in handling this particular patient. He had been told to have a female attendant with him whenever he performed breast or pelvic exams. He did not follow this basic rule. And when I confronted him about not following this guideline, he did not grasp its importance, for his protection and for that of the patient. He did not learn from his previous mistakes.
>
> Secondly, although he did not admit to any sexual impropriety, there is evidence to suggest such impropriety. This is supported by the fact that he took this patient into the ENT room, when other exam rooms were available. He examined her without a female attendant, even though he had been reprimanded not to do so. His instructions to patients to "move up and bear down" have no role in a standard pelvic exam. He allegedly told the 1992 complainant during the pelvic exam that "this is why I could never be an obstetrician/gynecologist, as the line is close between an exam and sexual pleasure."* * * His restrictive background and religious prohibitions regarding sexual contact are consistent with someone who may have sexual conflicts. (Redacted text in bold.)
>
> *5 Lastly, I have concerns regarding his clinical abilities. His medical approach to the April complainant seemed to be scattered and not up to a standard of care. For example, he treated the patient for asthma, even though her lungs were clear and he felt that she had no acute pathology. His diagnosis of cystic mastitis is certainly questionable. Although she allegedly had cystic breasts and a discharge, there was no redness, swelling, leukocytosis, or fever to indicate mastitis. I cannot imagine a clinical situation in which a physician would tell a patient, or suggest a boyfriend, "squeeze the secretions from the breast."And I am concerned that a patient with a complaint of lower right quadrant abdominal pain would be examined sitting upright in a chair.
>
> By Dr. Patel's description, this may have been a seductive patient. Nevertheless, in these instances, physicians should take special precautions to not only deliver good quality care, but also have a female chaperone present.
>
> I have serious concerns that Dr. Patel may put patients at risk, not only medically, but by sexual impropriety,

whether this be conscious or unconscious.

In her deposition, Dr. Frank indicated that at the time she conducted an independent medical evaluation of plaintiff in April 1996 she was the director of the psychiatric residency program at Henry Ford Hospital and the medical director of ambulatory psychiatry. She explained that during such an evaluation, information is gathered and a detailed history is taken of various items, including "family history and psychosocial history, which includes things such as family of origin, any religious, ethnic, cultural influences that affected who they are as a person."Dr. Frank explained that she had been asked by Mr. Riney to conduct the evaluation and that she had never spoken to Barnosky.

Dr. Frank explained that the examination lasted approximately seventy-five to ninety minutes, and that she explained the nature of the exam to plaintiff. She informed plaintiff that the exam was not confidential and was not being conducted for the purpose of treatment. She testified that her final report reflected the contemporaneous notes she had taken, where she had attempted to obtain direct quotations. Dr. Frank explained that her conclusions were based on the information she obtained from plaintiff and from Dr. Riney.

Dr. Gerald Shiener was called by the defense as an expert witness. Shiener opined that it was appropriate for plaintiff to be sent for an independent psychiatric evaluation because such an evaluation, called a "fitness for work" evaluation, was strongly recommended for the protection of the doctor, the hospital, and the hospital's patients. With regard to the report prepared by Dr. Frank, Shiener testified:

> A. The behavior that was described in his document that is Dr. Frank's report of the history that she took from Dr. Patel would be alarming and would be the kind of behavior that would lead a department chairman or a department director to question the doctor's fitness to practice and to cause to be undertaken or to cause to be performed a fitness exam.
>
> *6 Q. Why?
>
> A. Because a doctor who exhibits bad judgment or does not follow directives that have been provided him or approaches medical problems in a unique atypical way can pose a danger to himself, to the institution, and to the patients that the institution serves.

Shiener also testified that an individual's cultural and economic background is relevant in a psychiatric evaluation.

At the conclusion of the investigation a decision was made to terminate plaintiff's employment with the hospital. Riney testified that before making the decision he reviewed Valentine's report and Dr. Frank's report, and that interviews had been conducted of plaintiff, the patient, and other staff members. He testified that there was no discussion of plaintiff's religion or national origin, and that the consensus was that plaintiff's employment contract "could no longer continue and that we would offer him the option to either resign his employment or be terminated."

On May 9, 1996, Barnosky and Riney met with plaintiff and informed him of the results of the hospital's investigation. Barnosky testified that plaintiff's employment was terminated as a result of the investigation of the patient's complaint. Plaintiff was advised that he could resign or be terminated. Plaintiff declined to resign. On June 7, 1996, Riney mailed a letter by ordinary mail to plaintiff notifying him that his employment contract was terminated effective July 8, 1996.

Plaintiff testified that he was born in India and that he came to the United States in 1978. He was licensed to practice medicine in Michigan in 1982, and became board-certified in emergency medicine in 1990. He responded to an advertisement for an emergency room physician and was told by Barnosky to come in for an interview the following day. Barnosky offered the job to plaintiff "on-the-spot."

Plaintiff indicated that as the patient load in the emergency room increased over the years, he talked to Barnosky about the quality of the nurses. He complained that the nurses provided "slow care" to his patients and that they did not "chart immediately." Barnosky informed plaintiff that he would "see to that." When plaintiff again complained in 1994, Barnosky told him to talk to the clinical nurse manager. Afterward, the situation with the nurses "got worse" and the nurses began "internal bashing" with comments such as "we don't like Indian doctors." Plaintiff testified that a nurse said that "Indian doctors are lazy" and that they "like white girls." Plaintiff also testified that on one occasion in 1994 he heard Barnosky say that he "didn't like lazy Indian doctors, but that plaintiff was an exception."Plaintiff related the nurse's behavior to Barnosky.

Plaintiff testified that he always had a female chaperone present during a pelvic examination, but that sometimes the chaperone was an emergency department assistant who did not have the ability to "chart." He agreed that the

chaperone should be a registered nurse.

*7 With regard to the incident at issue, plaintiff testified that he saw the patient in the emergency room at approximately 9:45 p.m. on April 19, 1996. The patient complained of chest pains and shortness of breath and indicated that she had received no relief from breathing treatments at home. Plaintiff noticed that the patient had decreased breath sounds with minimal wheezing. Plaintiff ordered a complete blood count, electrolytes, blood sugar, a chest x-ray, cardiogram, pulmonary function test, and breathing treatment.

Plaintiff left the patient and attended to other patients for approximately 2-1/2 to 3 hours. After receiving the patient's test results and determining that all of the results were normal, plaintiff located the patient in the "urgent care chair area." Plaintiff talked to the patient in the hall and told her that he was ready to send her home and that she should follow-up with her doctor. The patient indicated that her breathing was worse and that she had chest pain and palpitation. In light of the complaint, plaintiff listened to the patient's back and front through a gown. He noted that her lungs were clear and that she had minimal wheezing. Plaintiff told the patient that "things sounded good" and told her to go home and make an appointment with her doctor. The patient then pulled her gown down and "did something with her breast." She asked, "What is this white stuff" discharging from her breast. Plaintiff put a glove on and looked at the discharge to see if there was any blood or puss. Plaintiff told the patient that the discharge looked like breast milk. The patient then grabbed plaintiff's hand and put it on her breast and said, "feel this, this is where I hurt ."Plaintiff indicated that he did briefly feel a lump as his hand passed over her breast.

Plaintiff then took a history from the patient regarding her breast problems. Plaintiff was aware that lumps could be caused by pregnancy or cystic mastitis, so he referred the patient to her doctor. The patient then showed plaintiff her other breast, massaged it, and said that it had discharge and was painful. Plaintiff told the patient to use warm compresses before "squeezing" out the discharge and to take Tylenol. The patient indicated that she wanted a doctor to squeeze out the discharge. Plaintiff refused, and told the patient that she could squeeze it out herself or have a friend do it. The patient continued to be persistent, so plaintiff tried to change the subject by asking her if she had a boyfriend.

Plaintiff turned away to take off his gloves, and the patient removed her gown and said, "I'm hurting here" while pointing to her abdomen. Plaintiff made a quick jabbing movement to plaintiff's abdomen, and she did not indicate any pain. The patient then put plaintiff's hand on her abdomen one inch below her belly button. Plaintiff noticed an "ugly scar" at this site that the patient said was from a "tummy tuck." Plaintiff told the patient that her pain was likely caused by scar tissue and told her to see her OB/GYN.

*8 Plaintiff testified that the following day Barnosky and Valentine showed him a chart with the name removed and asked him if he remembered the patient. Plaintiff told Barnosky what happened with the patient and noted that there was nothing "unusual." Barnosky did not show plaintiff any documents, but told plaintiff to go home. Barnosky advised plaintiff to see a psychiatrist because he was "under stress."

Later, Riney phoned plaintiff and gave him the name of psychiatrist Cathy Frank. Plaintiff signed a release to allow Dr. Frank to send a report to the hospital. However, plaintiff did not know that he was seeing Dr. Frank as part of the investigation. Plaintiff testified that he met with Dr. Frank for approximately forty-five minutes, during which she asked him questions about his background and he told her that he was from India and that his parents were Hindu. Plaintiff denied telling Dr. Frank many of the items contained in her report. He denied that he told her that his mother was a devout Hindu, or that his parents were strict Hindu. He testified that there are different sects of Hindu religious, although there is not much difference between the sects. According to plaintiff, his sect does not prohibit the touching of females and he testified that he did not tell Dr. Frank otherwise. Plaintiff testified that he did not tell Dr. Frank that he had been raised restrictively or that he was sexually repressed. He indicated that at a meeting with Barnosky and Riney on May 9 he was told that the hospital "has to let you go because you are sexually suppressed and Indian with Hindu restricted background and a danger to the patients ."

Following plaintiff's proofs, plaintiff moved for a directed verdict on the breach of contract claim. Defendants objected, arguing that, in light of plaintiff's presentation of proofs on the contract claim, it was up to the jury to decide whether plaintiff was entitled to wages for thirty days or 180 days following the effective date of the termination. The trial court directed a verdict on the contract claim, awarding plaintiff a total of $262,500 for the period of time he was on administrative leave, plus 180 days following the termination. At the close of proofs, the court denied defendants' motion for directed verdict on the discrimination claims.

The jury returned a verdict on the discrimination claim in the amount of $250,000 for past wage loss and $750,000 for past emotional distress. The trial court denied defendants' motion for judgment notwithstanding the verdict, new trial, or remittitur. The trial court also denied plaintiff's motion for a new trial or additur.

I

Defendants first argue that the evidence was insufficient to support the jury's verdict and that the trial court therefore erred by denying their request for judgment notwithstanding the verdict. In the alternative, defendants argue that the verdict was against the great weight of the evidence and that they are entitled to a new trial.

*9 A trial court's decision on a motion for JNOV is reviewed de novo.*Morinelli v Provident Life & Accident Ins Co,* 242 Mich.App 255, 260; 617 NW2d 777 (2000); see also *Forge v. Smith,* 458 Mich. 198, 204; 580 NW2d 876 (1998). In reviewing the decision, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge, supra.*If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v. Fewless,* 232 Mich.App 517, 524; 591 NW2d 422 (1998). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Forge, supra; Chiles, supra.*

This Court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion. *People v. Herbert,* 444 Mich. 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v. Lemmon,* 456 Mich. 625; 576 NW2d 129 (1998); *People v. Daoust,* 228 Mich.App 1, 16; 577 NW2d 179 (1998). This Court gives deference to the trial court's opportunity to hear the witnesses and its consequent unique qualification to assess credibility. *In re Leone Estate,* 168 Mich.App 321, 324; 423 NW2d 652 (1988); *Kochoian v. Allstate Insurance Co,* 168 Mich.App 1, 11; 423 NW2d 913 (1988). The trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. This Court must analyze the record on appeal in detail. *Morinelli, supra; Arrington v Detroit Osteopathic Hospital (On Remand),* 196 Mich.App 544, 560; 493 NW2d 492 (1992). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Daoust, supra.*

The Michigan Civil Rights Act (CRA), M.C.L. § 37.2101 *et seq.,* prohibits employment discrimination on the basis of religion or national origin. MCL 37.2202(1)(a). To prove religious or ethnic discrimination, a plaintiff must establish that religious or ethnic discrimination was a determining factor in the alleged adverse employment action. *Alspaugh v Comm on Law Enforcement Standards,* 246 Mich.App 547, 563; 634 NW2d 161 (2001).

A claim of intentional religious or ethnic discrimination may be premised on either direct or circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc (After Remand),* 463 Mich. 534, 539; 620 NW2d 836 (2001). Here, plaintiff's claim was based on direct evidence. Direct evidence has been defined as evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor."*Harrison v. Olde Financial Corp,* 225 Mich.App 601, 610; 572 NW2d 679 (1997). Where direct evidence of discrimination is offered, a plaintiff is not required to establish a prima facie case of discrimination within the framework of *McDonnell Douglas Corp v. Green,* 411 U.S. 792; 93 S Ct 1817; 36 L.Ed.2d 668 (1973).[2] Rather, where a plaintiff presents direct evidence of discrimination, the case proceeds as an ordinary civil case, i.e., the plaintiff must prove unlawful discrimination as the plaintiff would prove any other civil case. *Hazel v. Ford Motor Co,* 464 Mich. 456, 462; 628 NW2d 515 (2001).

*10 Here, plaintiff presented direct evidence of religious and ethnic discrimination. Plaintiff testified that he was told that his employment was being terminated because "you are sexually suppressed and you are Indian with Hindu restricted background."Taken in a light most favorable to plaintiff, this statement is direct evidence of religious and ethnic animus, evidence that, if believed, requires a conclusion that unlawful discrimination was at least a motivating factor in the adverse employment action. *DeBrow, supra* at 538-540.Thus, the trial court properly denied the motion for JNOV.

Defendant argues in the alternative that the trial court should have granted a new trial because the jury's verdict was against the great weight of the evidence. Specifically, defendant claims that although plaintiff may have presented the minimum quantum of evidence necessary to get the issue of whether defendants discriminated against plaintiff to the jury, the overwhelming weight of the credible evidence favored defendant's position.

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e), *Domako v. Rowe,* 184 Mich.App 137, 144; 457 NW2d 107 (1990). However, the jury's

verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the fact finder." *Ewing v. Detroit,* 252 Mich.App 149, 169-170; 651 NW2d 780 (2002); *Ellsworth v. Hotel Corp of America,* 236 Mich.App 185, 194; 600 NW2d 129 (1999). The trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Morinelli, supra.*If conflicting evidence is presented, the question of credibility ordinarily should be left for the fact finder. *People v. Lemmon,* 456 Mich. 625, 642-643; 576 NW2d 129 (1998); *Ewing, supra* at 170.

Because of plaintiff's direct evidence of discrimination, this case presents a question of mixed motives, one in which defendants' decision to fire plaintiff could have been based on several factors, legitimate ones as well as legally impermissible ones. Thus, once plaintiff presented direct evidence of discrimination, defendant had the burden of establishing by a preponderance of the evidence that it would have reached the same decision without consideration of plaintiff's protected status. In other words, if the employer can show that the same decision would have been reached even in the absence of discrimination, no liability arises. *Harrison, supra* at 613.See also *Wilcoxin v. Minnesota Mining & Mfg Co,* 235 Mich.App 347, 360-361; 597 NW2d 250 (1999).

In this case, the direct evidence of intentional discrimination centered on Dr. Frank's report. That report identified plaintiff as an Indian Hindu and set forth a history that detailed a strict upbringing with religious restrictions on the touching of women. One conclusion reached in the report was that plaintiff's "restrictive background and religious prohibitions regarding sexual contact are consistent with someone who may have sexual conflicts."Plaintiff alleged that Barnosky told him that the decision to terminate his employment was made "on the basis of Dr. Cathy Frank's report that you are sexually suppressed and you are Indian with Hindu background ."Plaintiff also relied on direct evidence to demonstrate that Barnosky, who both hired and had a role in the decision to fire plaintiff, had a predisposition to discriminate against him. Plaintiff referred to a remark allegedly made by Barnosky in 1994 about lazy Indian doctors. Plaintiff also testified that he talked to Barnosky in 1994 about racial comments made by members of the nursing staff and that Barnosky took no discernable action.

*11 Given this evidence, and keeping in mind the stringent standard that is applied when considering a motion for new trial that is based on the great weight of the evidence, we conclude that the trial court did not abuse its discretion by denying defendants' motion for new trial. Although conflicting evidence was presented, plaintiff presented sufficient evidence of discrimination that, if believed by the jury, was sufficient to support the verdict.

II

Defendants argue that the trial court erred when it held that certain information obtained from patient records was protected by the physician-patient privilege and was therefore inadmissible. They maintain that this holding failed to effect a proper balance between the competing interests of patient confidentiality and patient protection and served to deprive defendant of a fair opportunity to defend themselves against allegations that their employment decision was premised on improper considerations.

A preliminary issue of law regarding admissibility of evidence based upon construction of a statute is subject to de novo review. *Waknin v. Chamberlain,* 467 Mich. 329, 332; 653 NW2d 176 (2002). The decision whether to admit the evidence is reviewed for an abuse of discretion. *Chmielewski v. Xermac, Inc,* 457 Mich. 593, 613-614; 580 NW2d 817 (1998).

The physician-patient privilege in M.C.L. § 600.2157 provides in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

In a series of rulings, the trial court held that certain evidence contained in the investigative reports that had been gleaned from patient records could not be presented to the jury because admission of such evidence violated the physician-patient privilege. Thus, Valentine's report, Dr. Frank's report, and the testimony of Valentine and Dr. Frank were either redacted or limited. In so ruling, the trial court relied on *Baker v. Oakwood Hospital Corp,* 239 Mich.App 461; 608 NW2d 823 (2000). In *Baker,* the issue presented was whether the physician-patient privilege

applied to defeat the plaintiff's request for the release of non-party patient records she deemed necessary to prosecute a wrongful discharge claim against the defendant hospital and doctor. The plaintiff, a registered nurse, alleged that the defendant doctor had required her to practice medicine without a license in her interaction with patients, and that her complaints about this requirement were causally related to the termination of her employment. This Court concluded that the physician-patient privilege operated as an absolute bar to the unauthorized disclosure of patient medical records, recognizing no exception for records from which patient names had been redacted.

*12 *Baker,* however, is distinguishable in that it considered release of the medical records themselves. The present case does not involve the release of medical records but, rather, reports that contained information gleaned from a permissible review of patient records. Neither *Baker* nor any of the cases on which *Baker* relied considered the admissibility of evidence that did not reveal the patient's identity or any information from which that identity could be discovered. For example, in *Dorris v. Detroit Osteopathic Hosp,* 460 Mich. 26; 594 NW2d 455 (1999), the plaintiff sought discovery of the name of the non-party patient who shared her room and who may have observed the alleged medical malpractice of the defendant. The Court concluded that the release of such information would be directly contrary to the statutory privilege and its purpose of promoting confidential communication between patient and physician. See also *Dierickx v. Cottage Hosp Corp,* 152 Mich.App 162; 393 NW2d 564 (1986) and *Schechet v. Kesten,* 372 Mich. 346; 126 NW2d 718 (1964) (cases in which the plaintiff sought release of medical records).

The present case is also distinguishable from *Baker* in that the information in the present case is of a different character than that sought in *Baker.*This case does not involve the release of medical records themselves or the release of identifying information about the patient. Rather, this case involves a summarization of information gathered from medical records with regard to plaintiff's own actions and comments in treating patients. Thus, the information that was redacted, all of which was considered by defendants and relevant to their employment decision, was not "necessary to enable the person to prescribe for the patient as a physician."For example, information contained in the Valentine report that pelvic exams were done on two minors without any evidence of parental consent was stricken, as was plaintiff's notation that one of these minors was "too tight" to allow for a complete exam. Two other redacted notations in the report indicated that there was no documentation in either chart that any staff member had been present during the pelvic examinations. There was also a redaction in Dr. Frank's evaluation in which she reported that there had been a complaint against plaintiff because he stated, during the course of a pelvic examination, that he could never have been an obstetrician or gynecologist because "the line is close between an exam and sexual pleasure."

Other information redacted from the Valentine report focused on plaintiff's practice of performing pelvic examinations that were not indicated by the patients' complaints. The report compared patients' presenting complaints with the ultimate diagnosis and treatment that was rendered. Again, the report did not include any identifying information regarding the patients and did not include any patient's medical records.

*13 Under these circumstances, we conclude that the present case is distinguishable from *Baker.*Here, the hospital sought to use the information obtained from a permissible review of the medical records of plaintiff's patients in defense of a discrimination claim to explain the reasons for plaintiff's termination and did not seek to admit the medical records themselves.[3]The evidence sought to be admitted did not contain any identifying patient information. In addition, the majority of the information redacted was not information necessary to enable plaintiff to prescribe for the patient as a physician but, rather, was either about what was not in the charts or statements of plaintiff reported by the patient. Under these circumstances, we conclude that admission of the evidence was not precluded by the physician-patient privilege. Because defendants could not be held liable for an erroneous decision, but rather only for a discriminatory one, the jury needed the redacted information to properly consider whether, based on the information available to defendants, plaintiff's national origin and religion was a substantial factor in his termination. Without knowledge of the information presented to defendants, the jury could not fairly and properly make this determination and, therefore, defendants were denied a fair trial by the trial court's erroneous decision to redact the evidence. Accordingly, we reverse the jury's verdict on the claim of employment discrimination and remand for a new trial on this claim.

III

There is no dispute that plaintiff was entitled to contract damages for the period of April 20, 1996, through June 7, 1996, while he was on administrative leave. Defendants

argue on appeal that additional damages were limited under the contract to the thirty-day period following June 7, 1996,[4] and, therefore, the trial court erred when it directed a verdict awarding damages for a period of 180 days after the July 8, 1996, effective date of the termination. The construction and interpretation of a contract is a question of law for a trial court that this Court reviews de novo. *Henderson v State Farm Fire and Casualty Co,* 460 Mich. 348, 353; 596 NW2d 190 (1999).

In construing contractual language, a court should strive to effectuate the intent of the parties. Contract language is construed according to its ordinary and plain meaning; technical and strained constructions are to be avoided.*SSC Associates Limited Partnership v General Retirement System of the City of Detroit,* 210 Mich.App 449, 452; 534 NW2d 160 (1995). A trial court may direct a verdict on a breach of contract claim as a matter of law where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation. *Conagra, Inc v. Farmers State Bank,* 237 Mich.App 109, 132; 602 NW2d 390 (1999); *BPS Clinical Laboratories v Blue Cross and Blue Shield of Mich. (On Remand),* 217 Mich.App 687, 700; 552 NW2d 919 (1997).

***14** The employment agreement contained four methods for termination that were set forth in Article III, paragraph 4. Defendants relied upon two of these four methods at trial. Article III, paragraph 4(A) provided:

> (A) If either of the parties hereto commits a material breach of any of the terms or conditions of this Agreement and the breaching party fails to correct such breach within thirty (30) days after written notice thereof from the other party, such other party, at its option, may terminate this Agreement immediately or at any designated future time, provided the breach still exists, by delivering to the breaching party a written notice of termination and the effective date thereof.

Article III, paragraph 4(D) provided that the agreement "may be terminated by either party at any time during its term, without a showing of cause and without liability to the other (except to perform all obligations hereunder up to the effective date of the termination) upon not less than one hundred eighty (180) days written notice to the other."

Plaintiff was advised of the termination of his employment by correspondence dated June 7, 1996:

> This letter is a follow-up to your conversation with myself and Dr. Andrew Barnosky on May 9, 1996. As you are aware, based on an investigation involving patient complaints and pursuant to Article III General Provisions of your employment contract with Henry Ford Wyandotte Hospital, you were provided with the option of resignation of your employment or termination of the contract. We have not heard from you either verbally or in writing regarding any interest in resignation which at this point leaves us no alternative but to terminate your employment contract effective July 8, 1996 pursuant to employment agreement. Your compensation at your current rate of pay will continue through July 8, 1996.

Barnosky conceded at trial that the notice of termination did not satisfy the requirements of paragraph 4(A) because the notice did not give plaintiff the opportunity to cure. In addition, there is no dispute that the termination notice was not provided to plaintiff by either personal delivery or by certified or registered mail pursuant to Article III, paragraph 8 of the employment agreement. However, there is also no dispute that plaintiff did in fact receive the notice of termination. The trial court held that the notice was sufficient to terminate the contract under § 4(D), but was not sufficient to terminate the contract under § 4(A) because plaintiff had not been provided an opportunity to cure the material breach of the contract within the thirty-day period.

Defendants now argue that plaintiff's damages should have been limited to thirty days because no opportunity to cure needed to be given because of the nature of the breach involved. The plain language of paragraph 4(A) makes no exception for breaches that cannot be cured and, therefore, it was reasonable for the trial court to conclude that paragraph 4(A) required that plaintiff be given thirty days to cure the breach. However, it appears that paragraph 4(A) is not applicable in the present case. Paragraph 4(A) applies to a situation where a party "commits a material breach of any of the terms or conditions of this Agreement and the breaching party fails to correct such breach within thirty (30) days after written

notice thereof ..." This case does not involve a breach of the terms or conditions of the agreement (such as failure to work the required number of hours, etc.), but, rather, plaintiff's alleged improper conduct with a patient. Clearly, improper conduct toward a particular patient cannot be "cured." It does not appear that paragraph 4(A) is applicable in this case and, therefore, termination pursuant to paragraph 4(A) would not be appropriate. Thus, the trial court properly rejected defendant's claim to limit plaintiff's contract damages to thirty days under paragraph 4(A) as a matter of law.

*15 Given the nature of the allegations, defendants were presented with a situation in which they did not want plaintiff to continue treating patients pending the outcome of the investigation and, in their judgment, upon the results of the investigation. The employment agreement contained a provision allowing the agreement to be terminated immediately "in the event the doctor lost his staff privileges at the hospital."Article III, paragraph (C). To take advantage of this provision defendants would have had to initiate proceedings to eliminate plaintiff's staff privileges under the staff bylaws, which would have afforded plaintiff due process rights in connection with the proposed termination of staff privileges. Defendants, however, did not initiate such proceedings.[5]

III

On cross-appeal, plaintiff argues that that the trial court erred by limiting his contract damages to the 180-day period following the termination because the contract was never effectively terminated and damages continued to accrue. The construction and interpretation of a contract is a question of law that this Court reviews de novo. *Henderson v State Farm Fire and Casualty Co,* 460 Mich. 348, 353; 596 NW2d 190 (1999).

Pursuant to Art III, paragraph 4(D), of the employment contract, either party could terminate plaintiff's employment "without a showing of cause and without liability to the other ... upon not less than one hundred eighty (180) days written notice to the other."Plaintiff argues that his employment was not effectively terminated pursuant to paragraph 4(D) because, while the hospital did provide written notice to plaintiff, and although the plaintiff did in fact receive that notice, the notice was not sent to plaintiff in the manner required by Art III, paragraph 8 of the employment agreement:

> 8. *Notice:* Any and all notices, designations, consents, offers, acceptances or any other communications provided for herein shall be given to either party in writing, either by receipted personal delivery or by registered or certified mail, return receipt requested, addressed to the addressee ...

Relying on this paragraph, plaintiff contends that his employment was never properly terminated by defendants and that he remains an employee of the hospital because he received the written notice of termination through the regular mail.[6]

Plaintiff relies solely upon defendants' admission that the notice was not sent by certified or registered mail and was therefore not in technical compliance with the agreement. The undisputed evidence, however, reveals that plaintiff did in fact receive the written notice required by the agreement. Additional proof of mailing of the written notice would serve no purpose in this case. Plaintiff has attempted to take advantage of a hyper technical construction and application of the employment agreement. Plaintiff has demonstrated no prejudice by the fact that defendants sent the notice of termination by ordinary mail rather than by personal delivery or certified or registered mail.[7]

*16 Affirmed in part, reversed in part, and remanded for a new trial. Jurisdiction is not retained.

O'CONNELL, J. (concurring in part and dissenting in part).

OCONNELL, J.

I concur with parts II and III of the majority opinion. However, I respectfully dissent from part I of the majority opinion. I conclude that the verdict was clearly against the great weight of the evidence. Assuming arguendo that plaintiff presented sufficient evidence to support a verdict of wrongful discharge on the basis of racial discrimination, I conclude that defendant has presented overwhelming evidence that the same decision would have been reached even in the absence of evidence of discrimination.

Because plaintiff provided direct evidence of discrimination, this case presents a question of mixed

motives, one in which the decision to fire plaintiff could have been based on several factors-legitimate ones as well as legally impermissible ones. *Harrison v. Olde Financial Corp,* 225 Mich.App 601, 610; 572 NW2d 679 (1997). Thus, once plaintiff presented direct evidence of discrimination, defendant had the burden of establishing by a preponderance of the evidence that it would have reached the same decision without consideration of plaintiff's protected status. *Id.* at 611.In other words, if the employer can show that the same decision would have been reached even in the absence of discrimination, no liability arises. *Id.;* see also *Wilcoxin v. Minnesota Mining & Mfg Co,* 235 Mich.App 347, 360-361; 597 NW2d 250 (1999).

In my opinion, plaintiff's termination was justified because of his admitted violation of the hospital's chaperone policy[1] and complaints of female patients of plaintiff's impropriety during examinations conducted without a chaperone. To allow plaintiff to remain on staff as an emergency room physician is contrary to professional standards and places defendant hospital in an untenable position. Thus, in my view, the trial court erred when it failed to grant the motion for judgment notwithstanding the verdict (JNOV). See *Phinney v. Verbrugge,* 222 Mich.App 513, 524-525; 564 NW2d 532 (1997).

Plaintiff, an emergency room physician, was terminated after an internal investigation revealed that plaintiff failed to comply with the hospital's policy of having either a registered nurse or other appropriate chaperone present when performing breast and pelvic examinations. This policy was explained to plaintiff and memorialized in an October 3, 1995, memorandum that was placed in plaintiff's file after a complaint had been registered against plaintiff for performing an improper act during the course of a pelvic examination.[2]

On April 20, 1996, another complaint was filed by a patient who was treated by plaintiff when she sought treatment in the emergency room for chest pains and shortness of breath. The written complaint stated in part:

> Dr. Patel pulled my gown down to my waist, fully exposed my breasts and listened to my chest. He then began to feel and massage my breasts and rub, squeeze and pinch my nipples. Pt asked Dr. Patel "What are you doing, shouldn't a nurse be in here too? Pt states "I've never had a breast exam like this."States "I never had a problem with my breasts.""I then felt something wet on my nipples and asked Dr. Patel what's going on."Dr. Patel informed pt that she had white d/c from her nipples. Pt states "I never had a problem with my breasts and nipples before this.""Anybody would have d/c from their nipples if they were pinched pulled and manipulated this much."Dr. Patel told her "maybe it's hormonal, are you sexually active?"Pt told Dr. Patel "yes." Dr. Patel then asked her if she had a boyfriend. He then asked her if she had abdominal pain. Pt told him "no, not now." Dr. Patel asked her if she ever had abdominal pain and the pt said "well, yes, hasn't everybody had abdominal pain before."Dr. Patel then told the pt to lay back to let him palpate her abdomen. He then began palpating her abdomen. Pt reports saying several times to Dr. Patel "shouldn't a nurse be in here with us."Pt states she placed her hand over her pubic area to "guard" herself. Pt reports feeling "very uncomfortable about this exam." Dr. Patel had his hand under her gown palpating her lower abdomen and told her to move her hand, which she refused. He then reported he felt a lump at the lower abdomen area and told her "I need to see inside." The pt asked, "what do you mean?" She then noticed that he had put a rubber glove on one hand and could feel fingers between legs. Pt says she told Dr. Patel, "no way, I don't need a pelvic exam, I came here for my breathing.""Shouldn't a nurse be here for this, anyways."She reports Dr. Patel proceeded to ask 3 times to do a pelvic exam which pt kept refusing.

*17 After this complaint was filed, hospital officials met with plaintiff, who denied any impropriety but admitted there was no female chaperone in the ear, nose, and throat room when he examined the patient.[3]Hospital officials placed plaintiff on administrative leave and commenced an investigation. The investigation determined that plaintiff had fifty-five emergency room files that showed inconsistencies between diagnosis and treatment. Plaintiff was also found to have performed more pelvic examinations than other physicians when presented with similar patient information. The investigation further showed that plaintiff's treatment of patients was often inconsistent with the nursing notes and laboratory results contained in the files.

After completion of the investigation, a meeting of hospital personnel was held, during which a decision was made to terminate plaintiff's employment. Again, plaintiff was terminated because he preformed unnecessary and inappropriate pelvic and breast examinations and because he failed to have a chaperone present during these examinations as required by hospital policy.

In my opinion, defendant presented sufficient nondiscriminatory reasons to discharge plaintiff; therefore, the trial court erred in failing to grant the motion for JNOV. See *Harrison, supra.*

Footnotes

1 Valentine explained that each physician has a "trend file" that is "kept for credentialing and reappointment" and that patient complaints end up in this file.

2 The *McDonnell Douglas* standard for establishing a prima facie case of discrimination in a case involving circumstantial evidence requires a plaintiff to establish that that (1) plaintiff belongs to a protected class, (2) plaintiff suffered an adverse employment action, (3) plaintiff was qualified for the position, and (4) the circumstances of the adverse action give rise to an inference of unlawful discrimination.

3 In *Stachowiak v. Subczynski,* 411 Mich. 459, 464-465; 307 NW2d 677 (1981), the Court held that the prohibition against the use of hearsay did not preclude introduction of evidence that was admitted to explain why certain action had been taken by the defendant, further finding that that there had been no abuse of discretion in admitting the evidence because it was "central to the defense that Dr. Subczynski based his judgment as to how to proceed with the treatment on his understanding of the consequences of various treatments."Similarly, in the present case the redacted evidence was central to defendants' defense.

4 By correspondence dated June 7, 1996, defendants advised plaintiff of the termination of his employment.

5 In light of our resolution of the appeal, we need not address the remaining issues raised by defendants on appeal.

6 In support of his argument that the contract could only be terminated pursuant to the method of termination set forth in the contract, plaintiff relies on *Lichnovsky v. Ziebart Internat'l Corp,* 414 Mich. 228; 324 NW2d 732 (1982). However, the issue in *Lichnovsky* did not center on the method of termination used to terminate the contract, nor did it center on the notice provisions of the contract. Rather, the opinion focused on the permissible bases for terminating the contract, and was not concerned with the technical requirements for effectuating that termination or providing notice of termination. Thus, the only issue addressed by the Court does not pertain to the issue raised in the present case.

7 In light of our resolution of the appeal, we need not address the remaining issue raised on the cross-appeal.

1 On numerous occasions plaintiff was instructed that he was not to perform pelvic or breast examinations on female patients unless a female nurse or other appropriate chaperone was present in the examining room.

2 Pursuant to plaintiff's contract he was required to apply for medical staff privileges every two years. In 1996, he was granted only a conditional reappointment, rather then a standard two-year appointment. The conditional reappointment was related to plaintiff's interpersonal skills and patient complaints lodged against him.

3 Hospital records revealed that emergency examination rooms were available but plaintiff went across the hall to use the ear, nose, and throat room without a chaperone.

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